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IN THE

Supreme Court of the United States

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, ET AL, PETITIONERS

v.

DOW CHEMICAL COMPANY, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER AT THE TIME OF THE VIETNAM WAR THE USE OF A HERBICIDE THAT CONTAINED AN EXCESSIVE, AVOIDABLE AND UNNECESSARY POISON VIOLATED CUSTOMARY INTERNATIONAL LAW?

II. WHETHER THE DECISION BY THE COURT OF APPEALS IN AFFIRMING THE GRANT OF A MOTION TO DISMISS UNDER RULE 12(B)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE WAS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS TO REVERSE THE GRANTING OF THE MOTION TO DISMISS IN THIS CASE?

III. WHETHER THE COURT OF APPEALS UNWARRANTED EXPANSION OF *BOYLE* INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE AND SHOULD BE REVIEWED BY THIS COURT?

PARTIES TO THE PROCEEDING

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, PHAN THI PHI PHI, NGUYEN VAN QUY, Individually and as parent and natural guardian of NGUYEN QUANG TRUNG, THUY NGUYEN THI NGA, His children, DUONG QUYNH HOA, Individually and as administratrix of the estate of her deceased child, HUYNH TRUNG SON, On behalf of themselves and others similarly situated, NGUYEN THANG LOI, TONG THI TU, NGUYEN LONG VAN, NGUYEN THI THOI, NGUYEN MINH CHAU, NGUYEN THI NHAM, LE THI VINH, NGUYEN THI HOA, Individually and as parent and natural guardian of VO THANH TUAN ANH, Her child, VO THANH HAI, NGUYEN THI THU, Individually and as parent and natural guardian of NGUYEN SON LINH and NGUYEN SON TRA, Her children, DANG THI HONG NHUT, NGUYEN DINH THANH, NGUYEN MUOI, HO THI LE, Individually and as administratrix of the estate of her deceased husband HO XUAN BAT, HO KAN HAI, Individually and as parent and natural guardian of NGUYEN VAN HOANG, Her child, and VU THI LOAN,

Petitioners

DOW CHEMICAL COMPANY, MONSANTO COMPANY, MONSANTO CHEMICAL CO., HERCULES, INC., OCCIDENTAL CHEMICAL CORPORATION, THOMPSON HAYWARD CHEMICAL CO., HARCROS CHEMICALS, INC., UNIROYAL CHEMICAL CO, INC., UNIROYAL, INC., UNIROYAL CHEMICAL HOLDING COMPANY, UNIROYAL CHEMICAL ACQUISITION

CORPORATION, C.D.U. HOLDING, INC., DIAMOND SHAMROCK AGRICULTURAL CHEMICALS, INC., DIAMOND SHAMROCK CHEMICAL COMPANY, also known as DIAMOND SHAMROCK REFINING & MARKETING CO., also known as OCCIDENTAL ELECTRO CHEMICAL CORP., also known as MAXUS ENERGY CORP., also known as OCCIDENTAL CHEMICAL CORP., also known as DIAMOND SHAMROCK, DIAMOND SHAMROCK CHEMICAL, also known as DIAMOND SHAMROCK REFINING & MARKETING CO., also known as OCCIDENTAL ELECTRO CHEMICAL CORP., also known as MAXUS ENERGY CORP., also known as OCCIDENTAL CHEMICAL CORP., also known as DIAMOND SHAMROCK, DIAMOND SHAMROCK REFINING AND MARKETING COMPANY, OCCIDENTAL ELECTROCHEMICALS CORPORATION, HOOKER CHEMICAL CORPORATION, HOOKER CHEMICAL FAR EAST CORPORATION, HOOKER CHEMICALS & PLASTICS CORP., CHEMICAL LAND HOLDINGS, INC., T-H AGRICULTURE & NUTRITION CO., THOMPSON CHEMICAL CORPORATION, also known as THOMPSON CHEMICAL CORP., RIVERDALE CHEMICAL COMPANY,

Respondents

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The opinions of the court of appeals are reported at 517 F.3d 104 (2nd Cir. 2008) (Appendix 1a-38a, hereinafter cited as "_a") and 517 F.3d 76 (2nd Cir. 2008)(39a-90a). The opinions of the district court dismissing the international and domestic law claims of the petitioners are reported as *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005)(175a - 496a); 304 F. Supp. 2d 404 (E.D.N.Y. 2004) (91a- 69a); 344 F.Supp. 2d 873 (E.D.N.Y. 2004) (170a-174a). The decision of the court of appeals denying petitioners' petition for rehearing en banc is unreported. (497a)

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2008. A timely petition for rehearing en banc was denied on May 7, 2008. On July 22, 2008, Justice Ginzberg extended the time within which to file a petition for a writ of certiorari to October 6, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

RELEVANT PROVISIONS INVOLVED

The Alien Tort Statute, 28 U.S.C. Sec. 1350, provides, in relevant part, that

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

The Hague Convention IV Respecting the Laws and Customs of War on Land, Annex, Article 23(a), 36 Stat. 2277, 2301,provides, in relevant part, that

> "[I]t is especially forbidden – a. To employ poison or poisoned weapons."

STATEMENT

In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 719-725 (2004), this Court re-affirmed that this country is obligated to abide by and enforce norms of customary international law. The courts below failed to abide by these obligations in this case. This Court has an obligation to grant a writ of certiorari to ensure that the millions of Vietnamese victims of Agent Orange and other poisonous chemicals do not go uncompensated.

For over ten years during the Vietnam War the United States Government sprayed herbicides which contained poisons (mainly dioxin) and which continue to adversely effect the citizens of Vietnam, as well as U.S. veterans. The question before this court is whether the respondents, who manufactured and supplied these chemicals to the government knowing they contained unnecessary and excessively high levels of dioxin, may avoid liability for their conduct.

The petitioners are citizens of Vietnam, and an organization which represents them, who suffer from their exposure to dioxin that is still present today in the water they drink, the soil they walk on and the food they eat. The respondents knew at the time that the products they supplied contained excessive and unnecessary quantities of dioxin. This case seeks to

hold these respondents accountable for their actions under both international and domestic law when they knew they were providing a poison to the United States government which was to be sprayed on millions of people and over vast areas of land in South Vietnam.

The Vietnamese petitioners, reliably estimated to include between 4 and 5 million people of Vietnam, were poisoned. They, and their off-spring, continue to suffer from Agent Orange related disease and birth defects. Large areas of Vietnam remain contaminated with excessive amounts of dioxin in the land and in the water. The law supports petitioners. Whether this Court has the moral courage to rule in their favor remains to be seen.

* * * * * * * * * * * * *

In an opinion and order filed on March 28, 2005 (175a - 496a), the Honorable Jack B. Weinstein, Senior United States District Judge for the Eastern District of New York, dismissed petitioners' international law claims. In related actions, (170a - 174a, 175a - 496a), the district court also dismissed the petitioners' domestic product liability claims based on the application of the government contract defense.

Characterizing the poison laced agents manufactured by respondents only as herbicides, the district court dismissed petitioners' Alien Tort Statute ("ATS") claim. The district court reached this conclusion on Rule 12(b)(6) consideration by ignoring the allegations in the amended complaint, as well as the scientific evidence, that Agent Orange, as it was constituted, contained an excessive, dangerous and unnecessary poison whose potential for human harm

was both known to the respondents and readily preventable.[1]

The district court also held, this time on Rule 56 consideration, that petitioners had failed to adduce evidence relating to their domestic tort law claims sufficient to survive respondents' assertion of the government contractor defense, despite extensive record evidence creating genuine issues of material fact as to the elements of that defense. The district court further held, without the benefit of any evidence, that injunctive relief would be inappropriate.

The court of appeals affirmed the district court's dismissal of the petitioners' amended complaint. The

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[1] Like the court of appeals, the district court improperly substituted its own views about the facts in this case for those set forth by the petitioners. Its legal analysis depends upon characterizing Agent Orange as a mere "herbicide" or "defoliant" and not a "poison" despite the factual allegations made in petitioners' amended complaint, that Agent Orange, contaminated as it was with a known deadly toxin at extraordinarily high level, was in fact a poison harmful to human health. (231a-233a) In doing so, the district court ignored allegations and record evidence that the respondents knew of the uses to which their product was being put; knew of the presence and toxicity of dioxin in Agent Orange; knew of the dangers to human health presented by dioxin exposure; knew of the levels of dioxin contained in Agent Orange; and knew that those levels were completely unnecessary in view of existing technology, but delivered the highly contaminated product to the government anyway. Without acknowledging or mentioning the evidence that dioxin is highly toxic even at very low concentration levels, the district court simply concluded, without analysis and based solely on the ratio of herbicide to dioxin in the mixtures sprayed in Viet Nam, that Agent Orange and the other herbicides sprayed in Viet Nam "should be characterized as herbicides and not as poisons." (233a)

court acknowledged that it was reviewing petitioners' international law claims brought pursuant to the Alien Tort Statute, 28 U.S.C. Sec. 1350, under the standards set out pursuant to Rule 12(b)(6). Yet, both the court of appeals and the district court reached their conclusions by radically departing from accepted jurisprudence when evaluating a motion to dismiss, a feat they accomplished by ignoring or mis-characterizing the allegations in the amended complaint.

Although the court of appeals acknowledged that the Vietnamese "Plaintiffs brought this action on behalf of themselves and all other similarly situated who sustained injuries as a result of their exposure to dioxin," (12a), one would not know from the rest of the opinion what dioxin is or why the petitioners characterized it as a poison for purposes of their international law claims.

Choice of words in the decision by the court of appeals is critical. By relegating dioxin to a "small" compound and a mere "component" of 2,4,5,T the court of appeals, much in the same way the district court did, minimizes the significance of this highly toxic and poisonous compound almost to the point that it is removed as an issue from the case.

Having engaged in this legerdemain, the court of appeals then framed the discussion of whether the use of a herbicide, without reference to the poison contained unnecessarily within, violated norms of customary international law in existence at the time of the Viet Nam War. That is, whether the Vietnamese petitioners stated a claim for relief for injuries allegedly caused "by their exposure to Agent Orange,

and other herbicides manufactured" by the respondents. (1a) The court repeated this formulation numerous times throughout its opinion.[2] This formulation of the issue was absolutely improper. This case is not and has never been about whether the manufacture, supply and use of **herbicides** per se to defoliate large areas of Viet Nam violated customary international law. Rather, it is about whether the use of herbicides which respondents knew contained excessive and avoidable amounts of poison (dioxin), and which added nothing to the defoliation process, violated customary international law.

Having redrafted petitioners amended complaint to address a different question than posed by

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[2] See., e.g, 3a (". . . the Plaintiffs have failed to allege a violation of international law because Agent Orange was used to protect United States troops. . ."); 6a ("legality of the use by the United States of herbicides in Vietnam."); 8a (". . . claims arising out of the use by the United States of herbicides, including Agent Orange."); 12a (". . . military's use of Agent Orange violated international, domestic, and Vietnamese law . . ."); 14a (". . . neither the military's use of Agent Orange nor Defendants' agreement to supply it to the military violated a well-defined and universally accepted international norm prohibiting the use of herbicides in war."); 21a (". . . the deployment of Agent Orange violated customary norms prohibiting use of "poisoned weapons" and the infliction of unnecessary suffering."); 24a ("In further support of their claim that the use of herbicides as "poison" violated international law, . ."); 25a ("The sources of international law relied on by Plaintiffs do not support a universally-accepted norm prohibiting the wartime use of Agent Orange that is defined with the degree of specificity required by Sosa."); 30a-31a ("Plaintiffs claim that the use of Agent Orange violated the norm of proportionality and caused unnecessary suffering . . .")

the complaint, the court of appeals was able to claim petitioners had not made out an ATS claim that would satisfy *Sosa*. That is, having framed the issue to suit an outcome, the outcome was predictable.

In similar fashion the court of appeals affirmed the district court's grant of summary judgment dismissing the remaining United States veterans' claims based on, as we discuss *infra*, an unwarranted and unprecedented expansion of the government contractor defense

REASONS FOR GRANTING THE PETITION

The decision by the Second Circuit in refusing to recognize a claim by the petitioners pursuant to the Alien Tort Statute, 28 U.S.C. Sec. 1350, conflicts with this Court's decision in *Sosa*. In a decision that gravely undermines the viability of future ATS jurisprudence, the court of appeals ignored well established treaty and customary international law which pre-dated the Vietnam War. It did so contrary to this Court's admonition in *Sosa* that when customary international law norms are well established, specific and definite at the time the conduct took place, the courts of this country have an obligation to enforce such laws. Indeed, it is this very set of circumstances, the use of a herbicide harmful to human beings because it contained an excessive and avoidable amount of poison (dioxin), whose dangers were known to the respondents and whose presence in the herbicide was wholly unrelated to the goal of defoliation, which the United States government itself opined before and after the Vietnam War would constitute a violation of customary international law.

The court of appeals accomplished this result by engaging in fact-finding and fact resolution inappropriate to the procedural posture of the case. The manner in which this case was disposed of by both the courts below was such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers to summarily reverse the granting of the motion to dismiss the petitioners international law claims in this case.

Finally, the decision by the Second Circuit granting summary judgment to the respondents on petitioners' domestic tort claims based on the government contractor defense conflicts with this Court's decision in *Boyle v. United Technology Corporation*, 487 U.S. 500 (1988).

I. AT THE TIME OF THE VIETNAM WAR THE USE OF A HERBICIDE THAT CONTAINED AN EXCESSIVE, AVOIDABLE AND UNNECESSARY POISON VIOLATED CUSTOMARY INTERNATIONAL LAW

The ban on the use of poison, the principal customary international law norm at issue in this litigation, is without question based on a "norm of international character accepted by the civilized world and defined with a degree of specificity comparable to the 18th-century paradigms." *See, Sosa*, at 724. Indeed, the court of appeals appeared to accept that proposition when it stated that the petitioners have "alleged a customary international norm proscribing the purposeful use of poison as weapon against human

beings. . ." (32a)

A finding that petitioners have alleged such a norm should have been dispositive. If the court of appeals admits, as they must, that petitioners have properly alleged the existence of this specific and definitive norm, it should have found that petitioners set forth a valid claim under the ATS. Inexplicably, the court of appeals then concluded, improperly, that this norm is inapplicable to this case. As we argue, *infra*, it achieves this result by improperly recasting the facts of this case into one involving only the legality of the use of a herbicide.

The spraying of a known poison on a human population is unambiguously a violation of both treaty, e.g., the 1907 Hague Convention, as well as customary international law (which was in fact codified in the Hague regulations), regardless of how it is administered. It makes no difference that the poison here was administered as part of a herbicide. The effect is the same whether the poison was simply sprayed alone over Viet Nam or sprayed as part of a herbicide. Article 23 of the 1907 Hague Convention specifically states that it is "especially forbidden . . . to employ **poison or poisoned weapons**," in war. Even when the court of appeals does discuss the term poison, it mistakenly refers to petitioners' claims as "the use of herbicides as "poison"', which it is claimed violated international law, instead of the use of herbicides which contain excessive and unnecessary amounts of poison. (24a)

The court of appeals's assertion that the prohibition against the use of poison is not specific and

definite enough to pass the *Sosa* test is simply wrong. As set forth at length in petitioners' briefs below, customary international law has long recognized a ban on the use of poison. Indeed, the ban on poison is every bit as specific as the ban on torture, which the court in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980), a case this Court cited approvingly in *Sosa*, noted to be a clear and specific violation of customary international law, and with far greater specificity than one of the 18th century paradigms cited in *Sosa*, "piracy," which 18th century international law defined with no more specificity than "robbery upon the sea." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820).

The same flawed legal analysis was applied to the opinions of Cramer and Buzhardt, who were specifically requested almost 30 years apart to opine on the legality of herbicides. Although the court of appeals gave lip service to the passages from Cramer and Buzhardt which state clearly the illegality of herbicides which are harmful to human beings, (23a), the court of appeals never directly considered this question because it framed the question as a challenge to the use of a herbicide, per se, rather than the use a herbicide with contained an excessive and avoidable amount of dioxin.[3] The court of appeals ignored this

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[3] This is, of course, an important factual distinction. Far from being present in trace amounts as a result of an unintended error in the manufacturing process, the petitioners have alleged that these defendant deliberately and intentionally created a produce that contained excessive and avoidable amounts of poison that has caused untold suffering and misery for generations of US veterans who were exposed to dioxin, as well as Vietnamese combatants and non-combatants alike, whose exposure level, it is undisputed,

distinction. Finding the proposed target of destruction, enemy crop cultivation, "a legitimate one," (27a), the court of appeals concluded that the Cramer Opinion endorsed the conduct of the respondents in this case.

However, the distinction employed by the court of appeals to discount the impact of the Cramer Opinion is not credible. The language of the Cramer Opinion could not be any clearer:

> the use of chemical agents . . . to destroy cultivations [sic] or retard their growth, would not violate any rule of international law prohibiting poison gas; **upon condition, however, that such chemicals do not produce poisonous effects upon enemy personnel, either from direct contact, or indirectly from ingestion of plants and vegetables which have been exposed thereto.**

(23a) [4]

That is precisely what petitioners alleged in this case, allegations which both the court of appeals and the district court have seen fit to either not discuss or dismiss without any factual or legal analysis.

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was much greater than that experienced by the veterans. The presence of dioxin, it is undisputed, had no military necessity, so that the respondents cannot hide behind any argument that its use, that is of dioxin, aided the war effort in any way. Rather, dioxin was present in Agent Orange for the most pedestrian of reasons – pure, unadulterated commercial greed.

[4] The Buzhardt Opinion sets forth the same precise conditions for the use of chemical agents to destroy crops. (24a)

The Cramer and Buzhardt opinions, as well as the 1956 Army Field Manual, (22a, 23a-24a), which itself relies on Article 23 of the 1907 Hague Convention, stand for the proposition that if the herbicides being used to defoliate contain poison, such use would violate customary international law.

The court of appeals erroneously accepted respondents' analysis that the Cramer opinion was based on the proposition that any prohibition against use of poison in war encompassed only substances intentionally used to harm humans. (25a-26a) Because, as the court of appeals erroneously concluded, the "record" supports this conclusion, (32a), that Agent Orange was used as a defoliant and not as a poison designed for targeting human populations, it therefore felt free to conclude that no claim had been made by the petitioners that would be actionable under *Sosa*. However, neither Cramer, nor the other authorities relied on by the petitioners, provide immunity in such a circumstance. The fact that Cramer and Buzhardt specifically limited the legal use of herbicides to defoliate to those which were not harmful to man, or poisonous when ingested, underscores this very point.

The court of appeals also cited to a lack of consensus with respect to whether the proscription against poison would apply to defoliants that had possible "unintended" toxic side effects. (26a) However, petitioners herein have not complained about "unintended" toxic side effect from a defoliant. It is petitioners claim that these respondents knew that a very potent poison, which did not have to be present, was in the agents provided to the government and that they would be sprayed over vast populated areas.

From this knowledge, a court can easily infer an intent to poison.

The position articulated by Cramer and Buzhardt was that herbicides with such poison are not permitted under the Hague regulations because of their deleterious effect on human beings, irrespective of the intent behind their use. Petitioners are not complaining about an unintended toxic side effect from a defoliant. Petitioners alleged that respondents knew full well that a very potent poison, which did not have to be present, and which provided no military benefit whatsoever, was in the agents provided to the government and respondents further knew they would be sprayed over vast and populated areas. From their knowledge, the court can infer intent to poison even though specific intent is not required. The diseases and birth defects suffered by the Vietnamese are direct effects of exposure to the poisons contained in these agents.

The court of appeals also reasoned that since nations saw fit to violate the Hague prohibition on poison it could not have been specific and universal enough to have risen to the level of customary international law at the time of the Viet Nam war. (30a) However, as *Filartiga* demonstrates, violations of a norm of customary international law does not undercut the existence of the norm.

The question asked of and answered by Cramer, Buzhardt, and the authors of the Field Manual was under what circumstances would herbicide use for wartime purposes be legally permissible under prevailing international law norms, and the answer was

that it was legal only as long as the herbicides did not "produce poisonous effects upon enemy personnel, either from direct contact, or indirectly from ingestion of plants and vegetables which have been exposed thereto." (23a) Far from the hyper-technical analysis of treaty language relating to poisoned and chemical weapons that respondents claim formed the basis of their opinions, these top legal officials for the U.S. military and the U.S. Department of Defense cited the norm of proportionality as well as the poison proscription.

These sources of international law support a universally-accepted norm prohibiting the wartime use of a poison laced herbicide which was then and is now shown to be harmful to human beings, either directly or indirectly. Whether poisoning humans was the intent of the United States military in using these herbicides is of little moment. It is enough if the respondents knew that the herbicide they supplied contained a poison that was harmful to human beings. That is a factual inquiry, as Cramer suggested, that was improperly precluded by the district court and the court of appeals's opinion.

Did the respondents know that the product they manufactured and sold to the government produced poisonous effects because of the presence of dioxin? That is a question which can only be answered after discovery on this issue, discovery which, notwithstanding the voluminous discovery in the Agent Orange cases that precede this one, has not been conducted. It was error for the Court of appeals to preclude this discovery based on the specious argument that customary international law at the time of the Viet Nam war only precluded the use of Agent Orange laced

with a poison if the government "intended to harm human beings." (26a) Such a conclusion flies in the face of the question which was settled before, during and after the war – that the use of a herbicide that contained a substance, dioxin, a known poison, which "produced poisonous effects" was a clear violation of customary international law.

The court of appeals also misapprehended the reference to the ICJ opinion regarding nuclear weapons which states that there is no definition of poison in Hague and there are different interpretations of the term. The court of appeals improperly extrapolated from this dicta to find that the norm prohibiting the use of poison or poisoned weapons is too indefinite to be enforced. This is not true. Words in treaties just as in legislation are to be interpreted with their plain meaning. Poison is just as specific and unambiguous a term as "torture" or "piracy."

The Second Circuit in *Filartiga v Pena-Irala*, 630 F.2d 876, 880-81 (2nd Cir. 1980), cited approvingly by this Court in *Sosa*, concluded "The prohibition [on torture] is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens." This clear and unambiguous norm does not lose its status as clear and unambiguous even if people may differ over whether a particular act, such as waterboarding, is torture.

In the ICJ, the issue was whether nuclear weapons should be held to be illegal under 23(a) of the Hague Convention or Geneva 1925. The court which ultimately based it opinion that the first use of nuclear weapons violated International Humanitarian Law, did

not find the Hague Regulations inherently ambiguous and indefinite. Just as a disagreement whether water-boarding is torture does not impact the universal prohibition against torture, so would disagreement over whether nuclear weapons are "poisonous weapons" for purposes of Hague Regulation 23(a) not affect the categorical proscription against use of poison or poisoned weapons in war. As noted above, the Hague ban on poison or poisoned weapons in war, codified in treaty form the prior bans on the use of poison or poisoned weapons in war from the Lieber Code, the St. Petersburg Declaration of 1868, the Brussels Declaration of 1874, and the Oxford Manual of the Laws and Customs of War, of 1880.

The court of appeals also misrepresented the history of the use of poison gas. It turned a clear violation of the law of Hague into a claim that state practice showed Hague did not outlaw poisonous gases. The use of poison gases by Germany in World War I did not mean that these weapons were not illegal under Hague. It meant that they violated the Hague regulations. Indeed, their use was condemned by many as being a violation of the prohibition of the use of poison. As one authoritative treatise has opined:

> As early as March 1918, representatives of the military authorities of the United States, France, Great Britain, Belgium, Italy and Portugal had informed the International Committee of the Red Cross that they considered the use of toxic and asphyxiating gases as being included in the prohibition of poison, and also in the prohibition of weapons, projectiles, or materials of a nature to cause superfluous injury. From its origin, the

> rule prohibiting modern types of chemical warfare has been linked to the prohibition of poison.

Stockholm International Peace Research Institute, "The Problem of Chemical andBiological Warfare" (Solna 1975), (hereinafter SIPRI) III SIPRI at 95.

Germany's excuse for using the gases was that the prohibition was against the parties using projectiles rather than cylinders to diffuse the gas. This resort to semantics was noted in *United States v. Alfred Krupp, et al.*, where the IMT at Nuremberg would later point out, with disapproval, the German resort to semantics to deny violations of the laws of war in initiating the use of poison gas. Reprinted in Leon Friedman, "The Law of War, A Documentary History" Vol 1 (Random House 1972) at 1352.

After the war, the Allies appointed a "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" to investigate and recommend action on war crimes. The Commission met in Versailles, the site of the Peace Conference and the conclusion of the Treaty of Peace with Germany on June 28, 1919. The Commission issued its report on March 29, 1919, which recommended that a "High Tribunal" be established to try enemy soldiers who committed "violations of the laws and customs of war and the laws of humanity," and that higher officials who "ordered or abstained from preventing violations of the laws or customs of war" were also to be tried. The law to be applied was "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and

from the dictates of public conscience." Reprinted in *Friedman* at 852-857.

Among the list of offenses to be prosecuted were:. . .(26) Use of deleterious and asphyxiating gases. . . 32) Poisoning of wells. The Commission recommended prosecuting the Kaiser of Germany himself, so as not to undermine the prosecutions against subordinate leaders. Id. at 851-852. Far from being a repudiation of Hague or a finding that state practice meant the Hague regulations were mere aspirational norms during World War I, the history shows that but for "realpolitik" considerations of international relations, the parties to the Versailles Treaty declared the German first use of poison gases, which prompted their retaliation, violated the Hague Regulations.

Finally, the court of appeals wrongly held that petitioners' claims regarding proportionality and superfluous and unnecessary suffering were too indefinite to satisfy the *Sosa* specificity requirement.

Professor Stefan Oeter has discussed the various customs and laws of war which were designed to promote limited warfare, so as to minimize the suffering and destruction of war. Article 23(e) of the Hague regulations prohibits the use of projectiles and materials of war calculated to cause superfluous injury or unnecessary suffering. Superfluous injury and unnecessary suffering are caused by the use of weapons and methods of combat whose foreseeable harm would be clearly excessive in relation to the lawful military advantage intended. Oeter states:

> Injuries can only be "superfluous" either if they are not justified by any military necessity, or if the injuries normally caused by the weapon or projectile are manifestly disproportionate to the military advantage reasonably expected from the use of the weapon. The first will only rarely be the case, since the intended injuring effect generally serves a military goal..... The second condition will only be fulfilled if the weapon is at least relatively superfluous — which requires a comparative analyis as to how much suffering various weapons cause and whether alternative military means could achieve the same results with less suffering.

Oerter, Stefan, "Methods and Means of Combat," *The Handbook of Humanitarian Law in Armed Conflicts*, at 402.

The presence of the dioxin in Agent Orange contributed nothing to the military use of the defoliant. In this case, therefore, there was no military use for the dioxin present in the herbicide the respondents supplied to the military. This is one of the rare instances where the presence of this potent poison in the herbicide is not justified at all by any military necessity. It was superfluous and the anti-plant weapon in which it was present could have accomplished the same result without the presence of dioxin. There is nothing about this analysis which is too indefinite for a court not to find in this case that the use of the dioxin laced herbicide violated the norm of superfluous injury and unnecessary suffering.

II. THE DECISION BY THE COURT OF APPEALS IN AFFIRMING THE GRANT OF A MOTION TO DISMISS UNDER RULE 12(B)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE WAS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS TO REVERSE THE GRANTING OF THE MOTION TO DISMISS IN THIS CASE.

The manner in which the courts below reached their erroneous conclusions contravenes the responsibility given to the federal courts in ruling on a Rule 12(b)(6) motion to dismiss. That rule permits a court to dismiss a complaint on its face only if the plaintiff has failed to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corporation v. Twombley*, __ U.S. __, 127 S.Ct. 1955, 1974 (2007).

Regardless whether *Twombley* changed the standard set forth in *Conley v. Gibson* 385 U.S. 334 (1957), it did not alter the long-established companion principles that the court must assume the truth of the well-pled factual allegations of the complaint and must draw all reasonable inferences against the movant, *see*, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir.2006); *Still v. DeBuono*, 101 F.3d 888, 891 (2d Cir.1996), and that "the court's function on a motion to dismiss is not to weigh the evidence that

might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Festa v. Local 3 International Bhd. Of Elec. Workers*, 905 F.2d 35; 37 (2nd Cir. 1990).

The courts below violated these standards for evaluating a motion under 12 (b)(6). Not only did the court of appeals not accept the well-pled allegations in the complaint, it substituted, as did the district court, its own view of the facts for those of the petitioners. The court of appeals has simply ignored the facts set forth in great detail in petitioners' briefs in the district court and in the court of appeals. As noted above, the word "dioxin" only appears in the court of appeals decision as a descriptive term and not for any analytical purpose.

The "facts" which the court of appeals relied on to affirm the dismissal of petitioners' claims make no mention of the high levels of dioxin in the herbicides manufactured by the respondents, nor of the harms which the respondents knew or had reason to know could be caused by them. The court of appeals made no mention of the petitioners' factual contention that respondents consciously and deliberately used a manufacturing process that insured high levels of dioxin was present in Agent Orange so as to increase their profits, and no mention that the presence of dioxin in the herbicide did nothing to aid the defoliation process. The court of appeals made no mention that dioxin was present in Agent Orange in excessive and avoidable amounts and that the evidence is clear that respondents' knowing inclusion of this toxic substance in the herbicides manufactured by the respondents has resulted in a public health crisis in Vietnam of

mammoth proportions.

The court of appeals made the same error concerning the issue of intent. The crux of the court of appeal's holding was that since the government's intent was not to spray a poison on humans, and that the dioxin contamination was an "unintended" consequence of spraying Agent Orange, there was not a sufficient level of intent necessary to demonstrate a violation of customary international law.[5] Petitioners allege otherwise in their amended complaint, at least insofar as the chemical company respondents are concerned. Petitioners clearly allege throughout the complaint that the respondents had actual knowledge of both the hazards and preventability of dioxin in Agent Orange yet delivered it anyway, knowing how it would be sprayed over vast inhabited areas. The court of appeal's error in this regard is made apparent when it writes that "**the record before us** supports the conclusion that Agent Orange was used as a defoliant and not as a poison designed for or targeting human populations." (26a) (Emphasis supplied). There was, in fact, no record before either the district court or the court of appeals on Rule 12(b)(6) consideration. The court of appeal's language is that of a court resolving a factual issue as a finder of fact, not that of a court considering a motion to dismiss based upon the allegations of the complaint.

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[5] This is critical because the court of appeals acknowledged at the oral argument that had the petitioners alleged that the respondents, or the United States government, intended by the use of these products to poison the Vietnamese, the petitioners would have stated a claim for violation of customary international law.

The customary international law norm prohibiting the use of poison or poisoned weapons is a norm that prohibits the use of poison because of its effects. The norm is not limited solely to the circumstance where poison is used with the specific intent to harm human beings. It is sufficient that the respondents knew, as the petitioners' have alleged, that dioxin was present in excessive and avoidable amounts, that supplying a product to the United States Government which contained this poison created a substantial risk of harm to human beings, and that, despite this knowledge, the respondents consciously and deliberately chose to manufacture and supply the government with a poisoned product.

This is one case where this Court is compelled to act on the grounds that the courts below have radically departed from the usual course of their judicial powers and cases decided by the Supreme Court concerning the proper role for a federal court in deciding motions to dismiss filed pursuant to Rule 12(b)(6). Under the circumstances, summary reversal is appropriate because the decision of the court of appeals "directly contravene[s]" Supreme Court precedent. *Horn v. Banks*, 536 U.S. 266, 267 (2002). See also, *Gonzales v. Thomas*, ___ U.S. ___, 126 S.Ct. 1613, 1614 (2006); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (summary reversal appropriate where decision is "flatly contrary to this Court's controlling precedent").

III. THE COURT OF APPEALS UNWARRANTED EXPANSION OF *BOYLE* INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE AND SHOULD BE REVIEWED BY THIS COURT

Petitioners' domestic law claims were addressed by the court of appeals in the companion cases filed by United States veterans. (39a-90a) This decision conflicts with and constitutes an unwarranted expansion of the decision of this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The impact of the court of appeal's decision involves a question of exceptional importance. By markedly expanding the government contractor defense, not only will victims of Agent Orange lose their rights but so might thousands of others with valid claims against government contractor's who withhold important information from the government.

Although the court of appeals technically affirmed the district court's ruling, it rejected all of its key findings of fact. Once these factual findings were reversed,[6] *Boyle* required the court of appeals to hold that summary judgment could not be granted on the government contractor defense. Instead, the court of appeals radically expanded the "government contractor

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[6] For example, the district court found that the government knew the respondents' manufacturing processes were producing 2,4,5-T with high levels of dioxin. The court of appeals found that the government did *not* know what processes Respondents used to manufacture 2,4,5-T. *Compare* 304 F. Supp. 2d at 438, 443 with 73a-75a.

defense," beyond recognition, adding new grounds inconsistent with *Boyle*.

In *Boyle* at 511, the Supreme Court set forth a three pronged test which a government contractor must satisfy to benefit from the defense: reasonably precise specifications, manufacturer conformity with those specifications, and whether the United States knew as much or more than the contractor about the risks of dangers of the product being supplied. In at least two respects, the decision by the court of appeals constitutes an unwarranted extension of *Boyle*.

First, the court of appeals' expressly found that the evidence relating to whether the United States knew as much or more than respondents *did not* support summary judgment. For example, the court of appeals held as follows:

> We doubt that the defendants can establish as a matter of law on the present record. . .that they shared the knowledge of the dangers of which they were aware with the government and that the government had far more knowledge about the dangers of Agent Orange in its planned use. Each is intensely factual and hotly disputed. . . ..

(69a, see also, 76a, 88a-89a) Indeed, these findings directly contradicted the district court's ruling that the government's knowledge and information was at all times greater than that of defendants. (139a-140a)

This should have ended the summary judgment inquiry, as *Boyle* was intended to prevent contractors from withholding potential health risks. The equal knowledge requirement is imposed because,

> in its absence the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability.'

(52a)

Instead, the court of appeals jettisoned *Boyle's* objective comparative knowledge determination, opting for what amounts to a *pre-Boyle* subjective determination of whether the undisclosed information was "substantial enough to influence the military decision" regarding the purchase and use of Agent Orange. This constitutes a dangerous and unwarranted expansion of *Boyle.*

Yet, even under this entirely new standard, there is abundant evidence that the respondents thought this undisclosed information would be highly material to the government's decision-making process. As respondent Hercules wrote in summarizing a secret meeting with respondent Dow, AS32, A5681[7]:

> They are aware that their competitors are marketing 2,4,5-T acid which contains alarming amounts of acnegen and if the government learns of this the whole industry will suffer. They are particularly fearful of a congressional investigation and excessive restrictive legislation. . .

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[7] These cites are to the record in the U.S. Veterans appeal.

At the same time, without telling the government, Dow developed a "test to determine dioxin levels" and started to implement some "techniques to reduce dioxin levels during the manufacturing process" that it had long known about. In Re: Agent Orange , 565 F. Supp. 1263, 1268-1270. Based on this record, an earlier panel of the Second Circuit had denied summary judgment on the very basis the court of appeals granted it. *See In Re: Agent Orange Product Liability Litigation* 818 F.2d 145 (2nd Cir. 1987), *cert denied*, 484 U.S. 1004 (1988).

The court of appeal's speculative conclusion that full and complete disclosure would not have made a difference cites no testimonial support. By contrast, the evidence offered below was to the contrary, Wayne Vandeventer, an Air Force officer responsible for contract specifications for Agent Orange, testified that he would have wanted to have known about dioxin and expected the chemical companies to have told him about its existence in 2,4,5-T. SR20, A6454-2. When first informed of the presence of the toxic contaminant dioxin in 1970, Dr. Robert Darrow, one of those responsible for recommending 2,4,5-T, stated that he and other relevant government personnel were "surprised when we got the information" and that "the feeling was there it should have been disclosed before." A6064-6065. Nor does the court of appeals explain why, in direct response to this revelation, 2,4,5,-T use was suspended in April 1970. RS84.

The court of appeals attempts to justify the vast amount of information not disclosed to the government about the "systemic problems" and the potential of dioxin being a "potent carcinogen" by concluding that

these are "not enough to convince a reasonable fact-finder that . . .the defendants knew that trace amounts of dioxin in Agent Orange might prove to be a carcinogen for those not involved in manufacturer or direct handling."[8] (89a) This attempt to justify the respondents' intentional secrecy goes beyond the scope of *Boyle* and ignores the district court's ruling that foreseeability would neither be a part of the summary judgment determination nor even a subject upon which the petitioners would be allowed to conduct discovery. On January 26, 2004, the district court stated: "I am not going to address causation either on the motion to remand or on the motion for summary judgment. . ." (A11607)

Second, the court of appeals eviscerates the *Boyle* requirement of reasonably precise specification. As noted in the court of appeals decision, (52a-53a), petitioners maintained that the exact contours of Agent Orange were *not* considered by the Government because: 1) the contracts included no specifications regarding the toxic impurity dioxin; and 2) the defect

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[8] Factually, this analysis suffers in several ways. First, the suggestion that dioxin was only present in "trace" amounts is wrong and demonstrates the court of appeals improper fact finding. Second, many service personnel did directly and regularly handle Agent Orange during the course of its widespread spraying in Vietnam. Third, even if respondents did not know for *certain* that dioxin caused cancer, they *did* know that dioxin's toxicity was positively scary: "one of the most toxic materials known," and "the most toxic chemical they have ever experienced." AS 34, 41. It is preposterous to rule, as a matter of law, that the government contractor defense did not require them to tell this to the government, or that, if the government had known, it would not have acted differently..

was caused by the respondents' chosen manufacturing methods. (AB8, AS7). Petitioners were supported by the unchallenged affidavits of two experts, Dr. Harry Ensley, a chemical expert on the manufacture of 2,4,5-T (A3241-3243, A3966, A147-48), and Ralph Nash, a nationally renowned authority on government contracts (A6989-A7000, A10347-A10355, A146-47). The court of appeals agreed entirely with petitioners.

> The defendants do not contest that the government's contractual specifications for Agent Orange are silent regarding the method of manufacturing or that the government harbored no preference, expressed or otherwise, regarding how the herbicides were to be produced. . .
>
> Indeed, they admit that they were under no federal contractual duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the toxicity levels.

(60a)

The court of appeals then concluded that this would have made a difference.

> [There is a] triable issue of fact as to whether the defendants could have complied with their contractual obligations to the government while using what the plaintiffs contend was a process that would have resulted in a defoliating agent substantially less dangerous to military personnel.

(62a) Again, this should have ended the inquiry. Respondents failed to establish the necessary "significant conflict" between contract specifications and state law duties regarding design required by Boyle.[9] 487 US at 508-509. AS25.

Instead, the court of appeals disregarded both its quotation of *Boyle* at 52a ("assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself.") and at 54a (government must have "made a discretionary determination about the material it obtained that related to the defective design feature at issue."). It held that because the government's unsophisticated testing of the product showed "no health hazard," (65a), even though their tests could not even detect dioxin[10] and were not designed to show dioxin's long term health effects – the government somehow *retroactively* implicitly approved "the design feature in question." (66a-68a) Thus, the court affirmed the grant of summary judgment even though "defendants do not rely on a contractual duty to demonstrate the required

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[9] Petitioners, supported by the affidavit of Dr. Ensley, contended that the respondents should have manufactured their 2,4,5-T with lower temperatures and longer hold times, which would have resulted in a far safer product. AS22, AS25, RS11, RS57-58, A3953-A3966. Petitioners describe this as a manufacturing defect. AB43-56. At 85a, the court of appeals redefines this as a "design defect." However it is described, the evidence is clear that it was never considered by the government.

[10] All of the respondents regularly tested their products for the level of dioxin contamination. The government by contrast did not know even that such a test could be performed until 1970. AB37-AB38, RS28.

conflict between federal interests and state law," (87a), and abandoned *Boyle* in holding that the government contractor defense does not require "a conflicting express contractual duty." (66a) The court of appeals concluded that the "reasonably precise specification" prong could be jettisoned whenever the government later reorders "the same product **with knowledge of its relevant defects,**" because this "plays the identical role in the defense as listing specific ingredients, processes, or the like." (66a) (Emphasis added).

Boyle says nothing of the kind. It concerned itself with disclosure at the time the contract is formed. Moreover, the court of appeals never explains what "defect" the government supposedly retroactively approved; indeed, the court of appeals stated that the government approved the product precisely because *it did not find a defect.* (65a) It is axiomatic that the government cannot ratify a defect which it **fails** to discover.[11] Ruling that mere reordering without knowledge of a defect, without requiring the contractor to perpetuate the defect, as a "precise specification" stretches *Boyle* beyond any conceivable breaking point. Any government reorder of a defective product would satisfy the government contractor defense, even if the defect was not mandated by the contract and the

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[11] The court of appeals asserted defect ignores the court of appeal's own conclusion that the manufacturers never told the government of the multiple health hazards of dioxin contamination in 2,4,5-T, nor how the government's conclusion that Agent Orange was harmless resulted in part from the manufacturers' blatant misrepresentation that none of the workmen in their factories have shown any ill effect." *Compare* 73a-74a with A4624, AS43, RS73, RS80.

government was ignorant of the defect, merely because the product passed any inadequate government safety test. This too constitutes a dangerous and unprecedented extension of *Boyle*.

The court of appeals attempted to justify this gross deviation from *Boyle* by relying on *Lewis v. Babcock and Wilcox*, 985 F.2d 83 (2d Cir. 1993), which held that once the government tests a chemical product in *any* way for *any* harm, it immunizes the manufacturer. This is a tortured reading of the word "any" in the *Lewis* decision.

> We hold that when the [g]overnment reordered the specific Babcock cable, with the knowledge of its alleged design defect, the [g]overnment approved reasonably precise specifications for that product such that the manufacturer qualifies for the military contractor defense for *any* defects in the design of the product.

985 F.2d at 89.

The word "any" in the quote above can only mean "any design defect known to the government when it reordered the product." The facts in *Lewis* makes this clear. That is, once the government specifically ordered a part knowing the precise nature of the design specification, and hence the "defect," *Boyle* was satisfied.

Even more significant, the court of appeal's conclusion is irreconcilable with *In Re: Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626, (2d. Cir. 1990) ("*Grispo*"). In *Grispo*, the

defendants, asbestos manufacturers, had a far stronger defense than that offered here. The Navy was fully aware of both the dangers posed by asbestos and that the manufacturers provided *no* warnings on the packaging, but it still independently decided not to provide this information to the workers. 897 F.2d at 631-633. Indeed, when the asbestos manufacturers offered to issue warnings on the packaging specified by the contract, the Navy responded that "we do not believe any specification changes are needed". *Id* at 633. Nonetheless, the *Grispo* court ruled that the first element of the government contractor defense, requiring the government to approve "reasonably precise specifications," can only be invoked where the government's specifications limit "the contractor's ability to accommodate safety in a different fashion." Because the government did not "(stand) in the way of manufacturers issuing warnings on their own," they were not entitled to summary judgment on the government contractor defense. *Id* at 633.

Yet, the court of appeals here disregards the exact same finding:

> [There is a] "triable issue of fact as to whether the defendants could have complied with their contractual obligations to the government while using what the plaintiffs contend was a process that would have resulted in a defoliating agent substantially less dangerous to military personnel."

(62a)

Clearly, it is *Grispo's* holding, not the court of appeal's, which is consistent with *Boyle's* mandate that the government contractor defense does not apply if "the contractor could comply with both his contractual obligations and the state prescribed duty of care." 487 US at 509. This includes manufacturing methods, as stated in *Grispo* at 631: "government contracts often may focus upon product content and design while leaving other safety-related decisions, such as the method of product manufacture." This is certainly true here where the government did not even know how the respondents manufactured their 2,4,5-T. Under *Grispo*, this fact, on its own, would have been more than sufficient to defeat summary judgment.

As the *Grispo* court held, "Boyle's requirement of 'reasonably precise specifications' mandates that the federal duties be imposed upon the contractor. . .. Stripped to its essentials, the military contractor's defense under Boyle is to claim 'The government made me do it.'" *Id.* At 630, 632. Here, the court of appeals dispensed with what *Grispo* described as the essence of the defense by granting judgment to the respondents even though it acknowledged that there was an issue of fact over whether the government "made them do it." Because the court of appeal's ruling cannot be reconciled with *Grispo*, asbestos manufacturers, and other companies which supply defective products to the government will now be shielded from liability whether or not their contracts allow them to "accommodate safety in a different fashion".

Most importantly, the court of appeals held that no reasonable factfinder could find that the respondents had knowledge of a danger (e.g. chloracne or liver

damage) "that might have influenced the military's conclusion that "operational use" of Agent Orange posed "no health hazard ... to men or domestic animals," (75a)

This statement stands in stark contrast to history. That is, the government ordered an end to the use of agent orange in 1970, not on the basis of human epidemiology or health effects in humans, but rather on the evidence of teratogenicity in mice found (in the mid 1960's) by researchers at the Bionetics laboratory which was commissioned by the National Cancer Institute to study the health effects of these chemicals. Evidence in the record shows Dow at least was aware of and had conducted animal studies showing similar information which was not disclosed. The Bionetics Study was suppressed primarily by respondent Dow until 1969. Given that the government stopped the use of Agent Orange based on animal data, there is simply no basis to support the court of appeal's conclusion that the government would have required more evidence of toxicity in humans to have stopped its use.

CONCLUSION

The court of appeals decision in these cases are plainly wrong and contribute to a jurisprudence of impunity. This Court should grant the petition for certiorari and either summarily reverse or set the case for briefing and argument.

Respectfully submitted,

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(any footnotes trail end of each document)
Docket No. 05-1953-cv
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, et al, Plaintiffs-Appellants,
-v.-
DOW CHEMICAL COMPANY, et al, Defendants-Appellees

June 18, 2007, Argued

February 22, 2008, Decided

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OPINION

MINER, *Circuit Judge:*

This appeal challenges the District Court's dismissal of an action brought by a purported class of Vietnamese nationals ("Plaintiffs") on behalf of themselves and all others similarly situated for injuries allegedly sustained by their exposure to Agent Orange and other herbicides manufactured by defendants-appellees United States companies (collectively, "Defendants") and deployed by the United States military during the Vietnam War. Plaintiffs brought this action seeking relief under the Alien Tort Statute, 28 U.S.C. § 1350, which grants the district courts jurisdiction over any civil action by an alien claiming damages for a tort committed in violation of international law or a treaty of the United States. In their Complaint, Plaintiffs

alleged that the United States government violated international law by spraying toxic herbicides in areas of South Vietnam from 1962 to 1970 and that Defendants either aided and abetted the government's violations by supplying it with Agent Orange or that they were directly liable in their corporate capacities. Plaintiffs also asserted claims grounded in domestic tort law. In connection with their alleged injuries, Plaintiffs sought money damages as well as injunctive relief in the form of environmental abatement, clean-up, and disgorgement of profits.

Defendants moved to dismiss the Complaint for failure to state a claim upon which relief could be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). In their motion, Defendants contended that the Complaint failed to state a claim under the Alien Tort Statute because it did not allege a violation of any well-defined and universally-accepted rule of international law as required by *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004). Defendants also argued that Plaintiffs lacked standing to bring suit, that their claims under the Alien Tort Statute were nonjusticiable under the political question doctrine, and that all of their claims were barred by the government-contractor defense. In addition, Defendants moved for partial summary judgment pursuant to Federal Rule of Civil Procedure 56 to dismiss all claims as barred by the applicable statute of limitations. In the course of the proceedings below, the United States government submitted a Statement of Interest supporting Defendants' position with respect to the issues of international law and on the questions of justiciability and the government-contractor defense.

The District Court made several rulings that were favorable to Plaintiffs, but it ultimately determined that Plaintiffs had failed to allege a violation of international law because Agent Orange was used to protect United States troops against ambush and not as a weapon of war against human populations. The District Court also determined that Plaintiffs' domestic tort law claims were barred by the government-contractor defense, which the court previously had found to bar similar claims brought by United States veterans against some of the same defendants named as defendants-appellees in the companion appeal decided herewith. Accordingly, the court denied Plaintiffs' claims for relief under both international and domestic law and granted Defendants' motion dismissing the Complaint. Because we agree with the conclusions reached by the District Court in this case, we affirm the judgment for the reasons set forth in this Opinion.

BACKGROUND

I. *United States Authorization of Herbicide Use in Vietnam*

Early in the Vietnam conflict, the United States government began exploring the possibility of using herbicides to deprive enemy forces infiltrating South Vietnam of the benefit of vegetation that provided them with cover and sustenance. In late 1961, the United States Department of State and the Department of Defense recommended to President Kennedy that the military initiate a defoliation program. President Kennedy soon accepted that recommendation and, in November 1961, approved the launch of military herbicide operations in Vietnam.

Operation Trail Dust, as the entire herbicide operation was called, included the United States Air Force Program known as Operation Ranch Hand, which commenced its defoliation spray missions in September 1962; missions targeting crops that sustained enemy forces commenced in November of that same year.

Herbicides were effective in meeting important United States and allied military objectives in Vietnam. As Assistant Secretary of Defense William Lemos explained: "[O]ne of the most difficult problems of military operations in South Vietnam is the inability to observe the enemy in the dense forest and jungle." After summarizing the military's herbicide operations, Admiral Lemos then concluded: "The result is that our forces have been better able to accomplish their mission with significantly reduced U.S. and Vietnamese casualties." Another Assistant Secretary later explained that the "use of . . . herbicides [in Vietnam] was appropriate and had one purpose--to [s]ave the lives of Americans and our allies." The record in this case reveals that the policy of the Department of Defense at that time was to "carefully select[]" crop destruction targets "so as to attack only those crops known to be grown by or from the [Viet Cong] or [North Vietnamese Army]," and the Department "ha[d] issued instructions to the Joint Chiefs of Staff to reemphasize the already existing policy that [chemical herbicides] be utilized only in areas remote from population." Admiral Lemos also stressed that the military had instituted policies intended to ensure that the herbicides were applied only to targets of military significance.

The herbicide program nevertheless was controversial,

as decision-makers recognized it would be from the outset. But despite concerns that Communist propaganda would characterize the program as a form of germ or chemical warfare, policymakers persisted in the decision to use herbicides in light of their substantial military benefits. They also consistently concluded that the military's use of herbicides in Vietnam was permissible under existing treaties and customary international law. Secretary of State Dean Rusk advised President Kennedy in 1961 that "the use of defoliant does not violate any rule of international law concerning the conduct of chemical warfare and is an accepted tactic of war." In 1969, the United States faced a move in the United Nations General Assembly to resolve whether the 1925 Geneva Protocol, *see* Geneva Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous or Other Gases and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 (entered into force Feb. 8, 1928, for the United States, Apr. 10, 1975) (the "1925 Geneva Protocol"), banned at least some herbicide use in warfare. The United States delegation rejected that interpretation, claiming that "[c]hemical herbicides . . . which were unknown in 1925, could not be included" within the scope of the prohibitions. Thus, the United States voted against the resolution. In 1970, when President Nixon transmitted the 1925 Geneva Protocol to the Senate for ratification, Secretary of State William Pierce Rogers reiterated that "[i]t is the United States' understanding of the Protocol that it does not prohibit the use in war of . . . chemical herbicides." And in 1975, when President Ford issued Executive Order 11,850 renouncing, "as a matter of national policy, first use of herbicides in war," his accompanying remarks confirmed the consistent position of the United States

that "the [1925 Geneva] protocol does not cover . . . chemical herbicides."

Congress was well aware of the herbicide program, and while it denied funds for certain military initiatives in Southeast Asia of which it disapproved, it never denied funding for herbicides. Instead, it affirmatively ratified herbicide use by appropriating funds specifically for herbicide procurement, and attempts by members of Congress to terminate or constrain the herbicide program failed by wide margins. *See* S. Rep. No. 91-1016, at 85-87 (1970). During the Senate debate over the Military Procurement Authorization Act of 1971, United States Senators Gaylord Nelson and Charles Goodell introduced an amendment to prohibit the expenditure of funds for any military application of anti-plant chemicals or for the transfer of anti-plant chemicals for use by other countries. The full Senate rejected this measure by a vote of 62-22. Another amendment sought to prohibit the expenditure of funds for the use of chemicals for crop destruction, and that amendment was rejected by a vote of 48-33. Thus, while keenly aware of arguments against the military use of herbicides in Vietnam, Congress continued to appropriate the funds necessary to sustain the program. *See* 116 Cong. Rec. 30,036-30,227 (1970).

Congress likewise was aware of the controversy over the legality of the use by the United States of herbicides in Vietnam. Indeed, a congressional report observed that, although it was highly desirable that the United States adhere to the 1925 Geneva Protocol, such adherence could be difficult to attain if it would require acceptance of the view that the use of herbicides would violate international law, a position the United States

had consistently rejected. *See* REPORT OF THE SUBCOMM. ON NATIONAL SECURITY, 91ST CONG., CHEMICAL-BIOLOGICAL WARFARE: U.S. POLICIES & INTERNATIONAL EFFECT 5-6, 9 (Comm. Print 1970). Even after the United States terminated the use of herbicides, the government continued to maintain that the 1925 Geneva Protocol did not prohibit the use of herbicides in war. When President Nixon submitted the Protocol to the Senate for its advice and consent, Secretary of State Rogers explained to the Senate that the United States had decided not to enter a reservation that would preserve its ability to use herbicides, precisely because the United States' position remained that the Protocol did not prohibit "the use in war of . . . chemical herbicides," Letter of Submittal from Secretary of State William P. Rogers to the President (Aug. 11, 1970). *See The Geneva Protocol of 1925: Hearings Before the Sen. Comm. on Foreign Relations, 92d Cong. 6-7* (1972).

II. *Post-War Adjustments with Vietnam*

The Paris Peace Accords of January 1973 ended the United States' participation in the Vietnam War. After the fall of Saigon in 1975, the United States severed relations with Vietnam and imposed a trade embargo prohibiting most commercial transactions between United States nationals and Vietnamese nationals. *See* 31 C.F.R. § 500.201. President Clinton partially lifted the trade embargo in February 1994, and he fully lifted it in March 1995. On January 28, 1995, the United States and Vietnam agreed to a settlement of certain outstanding claims between the countries. This 1995 Agreement covers all claims against either nation arising out of "the nationalization, expropriation, or

taking of, or other measures directed against, properties, rights, and interests" of the parties and their citizens during and after the war. Significantly, the 1995 Agreement makes no provision for reparations or restitution to settle claims arising out of the use by the United States of herbicides, including Agent Orange.

The United States and Vietnam continue to discuss issues arising out of the war in the context of their current diplomatic, economic, trade, aid, and security relationships.[1] A 2002 Memorandum of Understanding provides for scientists representing both governments to work together to determine the effects, if any, of Agent Orange on people and ecosystems, along with methods and costs of treatment and environmental remediation. But, to date, the United States never has agreed that it has a legal duty to provide funds or assistance to remediate harms allegedly caused by Agent Orange.

III. *Procurement of Agent Orange*

The facts relevant to the manufacture and procurement of Agent Orange are the principal focus of the appeals in the veterans' cases (especially with regard to the government-contractor defense) and are set forth in this Court's opinion resolving the veterans' claims before this Court. With respect to the instant appeals by Vietnamese nationals, a brief summary of the facts surrounding the veterans' appeals and additional relevant facts underlying the Vietnamese nationals' claims follows.

The herbicidal properties of the components of Agent Orange, 2,4-dicholoropheno-xyacetic acid (2,4-D) and 2,4,5-tricholorophenoxyacetic acid (2,4,5-T), were identified in research conducted by the United States military during the 1940s. In the 1950s, the military conducted field tests to demonstrate the feasibility of dispensing those substances from aircraft; these dissemination trials, and work on aerial spray systems, laid the groundwork for the defoliation systems used in Vietnam. In 1961, the Advanced Research Projects Agency of the Department of Defense evaluated the feasibility of defoliating tropical vegetation in Vietnam and recommended that appropriate formulations of 2,4-D and 2,4,5-T be exploited for immediate use. In January 1962, the United States Air Force began the operational phase of the defoliation program in South Vietnam, using a substance code-named Agent Purple. Later in 1962, a research team concluded that a 50/50 mixture of 2,4-D and 2,4,5-T was most effective--that formulation became known as Agent Orange. *See Isaacson v. Dow Chemical Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 304 F. Supp. 2d 404, 424-31 (E.D.N.Y. 2004).

Formal specifications for 2,4-D and 2,4,5-T were prepared and promulgated by the military. These specifications established the design and specific characteristics of the mixture of 2,4-D and 2,4,5-T that the government had requested. The same specifications also were later used as the basis for the military's procurement of Agent Orange. The government supplied manufacturers with copies of these specifications and incorporated them into the manufacturers' Agent Orange contracts. The government also strictly prescribed the markings that

were to be placed on the drums of herbicides manufactured by the Defendants. The names of the various "Agents" (Agent Orange, Agent Purple, etc.) refer to the three-inch color-coded band that the government required on the outside of the drums containing the relevant herbicide. Aside from that colored band, the government generally prohibited the manufacturers from including any language, markings, or identification on the drums. *Id.*

In 1966, the government became concerned that the pace of production of Agent Orange was insufficient to meet its projected needs and decided instead to compel production from the manufacturers. In so doing, the government acted under the authority of the Defense Production Act of 1950 ("DPA"), 50 U.S.C. App. §§ 2061-2168 (1951 & Supp. 1983). Section 101 of the DPA authorized the President to "require that performance under contracts or orders . . . which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders." *Id.* § 2071. The President thereafter delegated that authority to the Secretary of Commerce. 18 Fed. Reg. 6503 (1953). In March 1967, the United States Department of Commerce, expressly invoking Section 101 of the DPA, directed Defendants to accelerate the delivery of existing orders for the defoliant Agent Orange. This directive essentially commandeered all of the Defendants' capacity to produce Agent Orange. *In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d at 424-26.

IV. *End of the Herbicide Program*

In June 1966, a government study on the long-term health effects of pesticides, including 2,4,5-T (known as the Bionetics Study), uncovered evidence of teratogenicity (birth defects) in mice. The completed Bionetics Study was delivered to the National Cancer Institute (NCI), a component of the National Institutes of Health, in September 1968, although NCI personnel previously had received progress reports concerning the possible teratogenicity of 2,4,5-T. The government undertook further extensive analyses of the Bionetics Study's data in early 1969, but it did not restrict the ongoing herbicide program in Vietnam. However, upon the public release of the Study in October 1969, the government restricted the use of 2,4,5-T both in the United States (on food crops and around the home) and in Vietnam, limiting its use to areas remote from human populations. On April 15, 1970, the Department of Defense suspended military use of Agent Orange upon evidence of the toxicity of the dioxin component. Subsequently, herbicide spraying for defoliation using Agent White continued a short while, and crop destruction using Agents White and Blue continued through 1970. In January 1971, the last spray mission took place.

V. *Nature of the Complaint & Proceedings Below*

Plaintiffs in the instant action include individual Vietnamese nationals residing in both North and South Vietnam, as well as the Vietnamese Association for Victims of Agent Orange ("VAVAO"), a Vietnamese non-profit, non-governmental organization

representing persons who were exposed to Agent Orange and other herbicides during the war and whose purpose is to protect the interests of its members and to raise funds for their care and treatment. Plaintiffs brought this action on behalf of themselves and all others similarly situated who sustained injuries as a result of their exposure to dioxin. As the District Court enumerated in extensive detail below, Plaintiffs' alleged injuries included, among other things, miscarriages, birth defects, breast cancer, ovarian tumors, lung cancer, Hodgkins' Disease, and prostate tumors.

Plaintiffs alleged in their September 14, 2004 Amended Complaint that the United States military's use of Agent Orange violated international, domestic, and Vietnamese law and that Defendants either aided and abetted these violations or committed independent violations by fulfilling the military's demand for herbicides. With respect to their claims arising under international law, Plaintiffs alleged that Defendants' actions constituted torts that were cognizable under the Alien Tort Statute ("ATS"),[2] 28 U.S.C. § 1350, and included war crimes, genocide, crimes against humanity, and torture. With respect to their claims arising under domestic and Vietnamese tort law, Plaintiffs alleged that Defendants were liable for assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, wrongful death, and unjust enrichment under the laws of the United States, Vietnam, and the State of New York, and for strict product liability under the laws of the United States and the State of New York. Plaintiffs also sought equitable relief under theories of public nuisance and unjust enrichment. In their prayer for relief, Plaintiffs sought compensatory

and punitive damages as well as injunctive relief directing Defendants to provide environmental remediation of the allegedly contaminated areas in Vietnam and to disgorge profits gained from their production and supply of herbicide.

On November 2, 2004, Defendants filed several dispositive motions. They first moved under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the Complaint for failure to state a claim under the ATS. They further moved under Rule 56 for partial summary judgment dismissing all claims as time-barred. With respect to several threshold issues that applied to all international and domestic law claims, Defendants argued that Plaintiffs lacked standing to bring this action and that Plaintiffs had raised claims that were nonjusticiable under the political question doctrine, were time-barred, and were precluded by the government-contractor defense. On the merits, Defendants contended that Plaintiffs failed to allege a violation of international law under the ATS that would meet the standard set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004). Defendants also asserted that any award of injunctive relief requiring remediation of the land in Vietnam would be impracticable. On January 12, 2005, the United States government filed a Statement of Interest supporting Defendants' motion to dismiss the claims under the ATS as nonjusticiable, as barred by the government-contractor defense, and as insufficient to meet the Sosa standard.

At a hearing before the District Court, the parties agreed that the court could consider the motion under Rule 12(b)(6) as a motion for summary judgment

against all of the domestic law claims but not against the international law claims. They also agreed that the extensive record assembled by both parties in the related veterans' cases could be relied upon by the court on the summary judgment motions. On March 10, 2005, the District Court issued an opinion and order, which was amended on March 28, 2005. *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005). In its order, the District Court rejected Defendants' contentions and found in Plaintiffs' favor on a number of issues. Initially, although the court cited rulings denying associational standing to pursue damages claims, it held that VAVAO had standing because it also sought injunctive relief. *Id.* at 49-50. The court next rejected Defendants' position that Plaintiffs' claims were nonjusticiable, *id.* at 64-78, and it further determined that Plaintiffs' ATS claims were not subject to any statutes of limitation, *id.* at 59-64, or the government-contractor defense, *id.* at 85-99. Moreover, the court concluded that corporations could be liable in a civil action brought under the ATS for a violation of international law and that a claim for aiding and abetting liability was cognizable under the statute. *Id.* at 52-59.

Nevertheless, the District Court ultimately determined that none of Plaintiffs' claims could proceed. With respect to the ATS claims, the court concluded that Plaintiffs had failed to state a cause of action because neither the military's use of Agent Orange nor Defendants' agreement to supply it to the military violated a well-defined and universally-accepted international norm prohibiting the use of herbicides in war. *See id.* at 105-38 The court concluded that Plaintiffs' domestic and Vietnamese law claims were

barred by the government-contractor defense for the same reasons as set forth in the companion case brought by the U.S. veterans, *Isaacson v. Dow Chem. Co.*, 304 F. Supp. 2d 404 (E.D.N.Y. 2004). *See In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d at 15-17. The court also denied Plaintiffs' claims for injunctive relief, concluding that implementing such relief would be "wholly impracticable" and "could compromise Vietnam's sovereignty." *See id.* at 45-46. Final judgment dismissing the Complaint was entered on March 25, 2005, and this timely appeal by Plaintiffs followed.

ANALYSIS

Plaintiffs limit the scope of their appeal to three primary claims. They first contend that the District Court erred by dismissing their ATS claims, arguing that Defendants violated customary international law norms prohibiting the use of "poisoned weapons" and the infliction of unnecessary suffering.[3] Plaintiffs further argue that the court erred by dismissing their state law claims pursuant to the government-contractor defense without conducting further discovery with respect to Agents White and Blue, and incorporate by reference the same substantive contentions raised in the veterans' appeals. Finally, Plaintiffs assert that the court prematurely dismissed their claims for injunctive relief without the benefit of adequate discovery.

For their part, Defendants contend that Plaintiffs failed to state a cognizable claim under the ATS because the wartime use of herbicides solely for defoliation purposes did not violate international law and that prudential considerations counsel against the

recognition of Plaintiffs' claims. Defendants also argue that the ATS claims present nonjusticiable political questions because those claims require an inquiry into executive and legislative judgments relating to the prosecution of a war. In addition, Defendants assert that there is no basis in international law for either corporate liability or civil aiding and abetting liability, and they argue that Plaintiffs' ATS claims are barred by both the government-contractor defense and the statute of limitations. Defendants argue that Plaintiffs' state law claims are preempted by the federal foreign affairs power and the government-contractor defense, and they incorporate by reference the same contentions raised in the veterans' cases. Defendants also argue that the District Court properly denied injunctive relief because it would be impracticable for the court to supervise remediation of 5.5 million acres of distant foreign land. Finally, Defendants argue that the District Court acted within its discretion in denying additional discovery on Plaintiffs' claims relating to Agent White and Agent Blue, because these claims fail for the same reasons as the claims based on Agent Orange and because Plaintiffs had essentially abandoned these claims in the District Court.

I. *Standard of Review*

We "review a district court's grant of a motion to dismiss under Rule 12(b)(6) *de novo*." *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 28 (2d Cir. 2006). "For the purposes of such review, this Court must accept as true all allegations in the complaint and draw all reasonable inferences in favor of the non-moving party." *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 591-92 (2d Cir. 2007) (quoting

Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 776 (2d Cir. 2002)). We also "review de novo [a] district court's grant of summary judgment, construing the facts in the light most favorable to the non-moving party." *Gorman*, 488 F.3d at 595 (citing *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 162 (2d Cir. 2006)). "Summary judgment is appropriate only where 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Gorman*, 488 F.3d at 595 (quoting Fed. R. Civ. P. 56(c)). Finally, we review denials of leave to conduct discovery and of injunctive relief for abuse of discretion, which may consist of a ruling based upon an erroneous view of the law or a clearly erroneous assessment of the evidence. *See Bano v. Union Carbide Corp.*, 361 F.3d 696, 716 (2d Cir. 2004), *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994). *See generally Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169-71 & n.5 (2d Cir. 2001) (explaining that "[a] district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding or (2) its decision--though not necessarily the product of a legal error or a clearly erroneous factual finding--cannot be located within the range of permissible decisions").

II. *Plaintiffs' International Law Claims*

A. Alien Tort Statute and the *Sosa* Rule

The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The

ATS confers federal subject matter jurisdiction when three independent conditions are satisfied: (1) an alien sues, (2) for a tort, (3) committed in violation of the law of nations or a treaty ratified by the United States. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980). The Supreme Court has clarified that the ATS, which originally was enacted as part of the Judiciary Act of 1789, was jurisdictional in that it "gave the district courts cognizance of certain [then existing] causes of action." *Sosa*, 542 U.S. at 713-14 (internal quotation marks and citation omitted). The Court was clear that the ATS did not create a statutory cause of action, but the Court just as clearly rejected the notion that "the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action." *Id.* at 714.

In the broader context, the law of nations has become synonymous with the term "customary international law," which describes the body of rules that nations in the international community "universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003). In ascertaining whether a rule constitutes a norm of customary international law, courts have traditionally consulted "the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Filartiga*, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61, 5 L. Ed. 57 (1820)). Sources of international law generally include:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Filartiga, 630 F.2d at 881 n.8 (citing Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945)); *United States v. Yousef*, 327 F.3d 56, 100-01 (2d Cir. 2003) (same; also noting that scholarly works are not included among the authoritative sources of customary international law); *see also* Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987). While not exhaustive, the list of principles that may be said to have "ripened into universally accepted norms of international law," *Kadic v. Karadzic*, 70 F.3d 232, 243 n.8 (1995), includes the proscriptions against piracy, slave trade, attacks on or hijacking of aircraft, genocide, and war crimes, *see* Restatement (Third) of the Foreign Relations Law of the United States § 404 (1987). With respect to other types of violations, because customary international law "is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source," we have advised district courts to exercise "extraordinary care and restraint" in deciding whether an offense will violate a customary norm. *Flores*, 414 F.3d at 248.

In *Sosa*, the Supreme Court further cautioned courts to be careful in deciding whether an alleged violation of the law of nations could support an ATS claim. Mindful of the legislative history, albeit sparse, of the ATS, the Court limited the types of claims that could be recognized under the statute to those bearing the same character as the claims originally contemplated by Congress at the time of drafting--tort claims alleging violations of the law of nations of the sort that would have been recognized within the common law at the time of its enactment. 542 U.S. at 713-14. In the Court's view, "the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject," *id.* at 714, and "[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time," *id.* at 724. In particular, *Sosa* held that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" that informed the legislation. *Id.* at 725. Moreover, these "paradigms" encompassed only "those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724. Although the Court did not circumscribe ATS claims to include only these offenses, it concluded that any claim must reflect the same degree of "definite content and acceptance among civilized nations" as these historical antecedents. *Id.* at 732. Whether an alleged norm of international law can form the basis of an ATS claim will depend upon

whether it is (1) defined with a specificity comparable to these familiar paradigms; and (2) based upon a norm of international character accepted by the civilized world. *Id.* at 725, 738.[4] We accordingly begin our evaluation of Plaintiffs' ATS claims by considering whether they have alleged the violation of an international norm that is sufficiently clear in nature to support subject matter jurisdiction under the ATS.

B. Plaintiffs' Sources of Customary International Law

In support of their argument that the deployment of Agent Orange violated customary norms prohibiting use of "poisoned weapons" and the infliction of unnecessary suffering, Plaintiffs cite to a number of both domestic and international law sources. Primarily, they rely upon the 1907 Hague Regulations, Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, T.S. No. 539 (the "1907 Hague Regulations"); the 1925 Geneva Protocol; and the 1949 Fourth Geneva Convention, The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (the "Fourth Geneva Convention"), as well as other sources derived from these documents. The 1907 Hague Regulations, which the United States ratified in 1909, address the range of military operations executed on land and set forth the rules for conducting hostilities, including the permissible and impermissible means and methods of war, including poisonous weapons and the prohibition of materials calculated to cause unnecessary suffering. The 1907 Hague Regulations also form the basis of much of the language in the national military

law handbooks of leading international states, including those of the United States. *See* U.S. DEP'T OF THE ARMY, FIELD MANUAL: THE LAW OF LAND WARFARE (FM-27-10) 1956 (following the Hague Regulations article by article). By contrast, the Fourth Geneva Convention, which the United States ratified in 1955, principally addresses the treatment of noncombatants in the hands of enemy forces. As such, it is less relevant than the 1907 Hague Regulations. Nevertheless, the parties do not dispute that these treaties, with the exception of the 1925 Geneva Protocol, were in force with respect to the United States during the time frame alleged in the Complaint and that they have achieved the status of customary international law.

The United States did not ratify the 1925 Geneva Protocol until 1975. Accordingly, the Protocol cannot be said to have constituted "a treaty of the United States," 28 U.S.C. § 1350, during the period relevant to this appeal. Even at the time of ratification, the United States and other states reserved the right to respond in kind to a belligerent's first use of poisonous weapons and further limited the treaty obligation to apply only against other treaty parties. The Protocol provides: "[T]he use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world" and "shall be universally accepted as part of International Law, binding alike the conscience and the practice of nations." Given the nature and scope of the reservations to ratification, however, it would be an impermissible stretch to find that the 1925 Geneva Protocol had acquired the status

of binding customary international law during the Vietnam conflict.

In support of their argument that they have stated a claim cognizable under the ATS for a violation of the proscription against the use of poisonous weapons, Plaintiffs cite to the March 1945 letter opinion of Major General Myron C. Cramer, Judge Advocate General ("Cramer Opinion"), issued during the Second World War in response to a request from the Secretary of War. In particular, Plaintiffs point to the opinion's conclusion that

> the use of chemical agents . . . to destroy cultivations [sic] or retard their growth, would not violate any rule of international law prohibiting poison gas; upon condition, however, that such chemicals do not produce poisonous effects upon enemy personnel, either from direct contact, or indirectly from ingestion of plants and vegetables which have been exposed thereto. [W]hether [such herbicides] are toxic to such a degree as to poison an individual's system, is a question of fact which should be definitely ascertained.

In addition, Plaintiffs cite to the April 5, 1971 letter opinion of J. Fred Buzhardt ("Buzhardt Opinion") from the Office of General Counsel for the Department of Defense, in response to a request from Senator J.W. Fulbright, Chairman of the Senate Foreign Relations Committee. That opinion relates to the application of Articles 23(a) and (e) of the Hague Regulations of 1907--which were incorporated into the Department of the

Army Field Manual--to the destruction of crops through chemical agents during the Vietnam War:

> [N]either the Hague Regulations nor the rules of customary international law applicable to the conduct of war and to the weapons of war prohibit the use of antiplant chemicals for defoliation or the destruction of crops, provided that their use against crops does not cause such crops as food to be poisoned nor cause human beings to be poisoned by direct contact, and such use must not cause unnecessary destruction of enemy property.

In further support of their claim that the use of herbicides as "poison" violated international law, Plaintiffs rely on the opinions of their experts, Professors George P. Fletcher and Jordan Paust, as well as the works of other international law scholars, who generally contend that the use of chemical or biological warfare violates international law.

> In support of their claim that Defendants violated the prohibition against unnecessary suffering, Plaintiffs argue that the use of any material object that may have collateral consequences and is not necessary for military purposes is universally prohibited. In short, they contend that the use of Agent Orange was disproportionate to military necessity because it caused unnecessary human suffering. In particular, Plaintiffs assert that Articles 146 and 147 of the Fourth Geneva Convention prohibit "extensive destruction and appropriation of property, not justified by military necessity and

carried out unlawfully and wantonly" if committed against protected persons or property. In addition, they argue that Article 50 of that Convention lists as a "grave breach[]" the act of "willfully causing great suffering or serious injury to body or health." Plaintiffs further contend that the 1945 Nuremberg Charter and the 1951 Nuremberg Principles prohibit "war crimes"--namely, violations of the laws and customs of war, including "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

C. Whether Plaintiffs' Claims Are Based on a Universally-Accepted International Norm

1. *Application of Sosa to Plaintiffs' International Law Claims*

The sources of international law relied on by Plaintiffs do not support a universally-accepted norm prohibiting the wartime use of Agent Orange that is defined with the degree of specificity required by Sosa. Although the herbicide campaign may have been controversial, the record before us supports the conclusion that Agent Orange was used as a defoliant and not as a poison designed for or targeting human populations. Inasmuch as Agent Orange was intended for defoliation and for destruction of crops only, its use did not violate the international norms relied upon here, since those norms

would not necessarily prohibit the deployment of materials that are only secondarily, and not intentionally, harmful to humans. In this respect, it is significant that Plaintiffs nowhere allege that the government intended to harm human beings through its use of Agent Orange. In their Amended Complaint, Plaintiffs recognize that "[t]he stated purpose of the [herbicide] spraying was twofold: (a) to defoliate forests and mangroves to destroy the vegetative cover used by the [Democratic Republic of Vietnam] and [National Liberation Front] troops for concealment, and (b) to destroy crops to deprive them of food." In addition, Plaintiffs acknowledge that the herbicide defoliation campaign "heavily targeted," among other things, vegetative cover adjacent to U.S. military bases and surrounding areas, making it all the more implausible that the government intended to use the herbicide as a poisonous weapon during war.

There is lack of a consensus in the international community with respect to whether the proscription against poison would apply to defoliants that had possible unintended toxic side effects, as opposed to chemicals intended to kill combatants. The prohibition on the use of "poison or poisoned weapons" in Article 23(a) of the 1907 Hague Regulations is certainly categorical, *see* 36 Stat. 2277, 2301, but its scope is nevertheless undefined and has remained so for a century. As the International Court of Justice ("ICJ") has acknowledged in an authoritative interpretation of Article 23(a), that provision nowhere defines the critical term "poison," and "different interpretations exist on the issue." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion No. 95, 1996 I.C.J. 226, 248, 255 (July 8, 1996) ("Nuclear Weapons Advisory

Opinion"). Indeed, Plaintiffs' own expert conceded that "[t]he concept of 'poison' is not defined." Plaintiffs themselves concede that the authorities "go[] both ways" as to whether the use of herbicides in war, "particularly to destroy crops not intended for use by enemy forces, did violate established norms of international law prior to 1975."

Plaintiffs ignore language from the Cramer Opinion that would permit the use of Agent Orange under the circumstances in which it was in fact used. Notably, that Opinion recognizes that "[a] distinction exists between the employment of poisonous and deleterious gases against enemy human beings, and the use of chemical agents to destroy property, such as natural vegetation, crop cultivations, and the like." Moreover, the Cramer Opinion concludes that "[t]he proposed target of destruction, enemy crop cultivations, is a legitimate one, inasmuch as a belligerent is entitled to deprive the enemy of food and water, and to destroy his sources of supply whether in depots, in transit on land, or growing in his fields." The Buzhardt Opinion, as it relates to permissible uses of herbicides, notes that "General Cramer's opinion clearly encompasses the activities that have taken place in Vietnam and reflects the same position which we have taken" in evaluating the legality of the destruction of crops through chemical agents and the application of the 1925 Geneva Protocol and the 1907 Hague Convention.

According to the Buzhardt Opinion, the prohibition of poisonous weapons "does not effect any prohibition on the use of other weapons and, in particular, it does not prohibit the use of chemical herbicides for depriving the enemy of food and water." That Opinion interprets the

1956 Army Field Manual relied upon by Plaintiffs to permit "measures being taken . . . to destroy, through chemical or bacterial agents harmless to man, crops intended solely for consumption by the armed forces (if that fact can be determined)" but it draws a distinction between herbicides that are intended to destroy crops belonging to enemy soldiers and crops belonging to non-combatants. The Opinion further states as follows: "The thrust of the phrase 'harmless to man' . . . draws attention to Article 23(e) of the Hague Regulations of 1907, wherein combatants are forbidden to employ weapons 'calculated to cause unnecessary suffering.'"

In a further narrowing of the circumstances under which crop destruction is impermissible, the Buzhardt Opinion states:

> Where it cannot be determined whether crops were intended solely for consumption by the enemy's armed forces, crop destruction would be lawful if a reasonable inquiry indicated that the intended destruction is justified by military necessity under the principles of Hague Regulation Article 23(g), and that the devastation occasioned is not disproportionate to the military advantage gained.

The Opinion concludes that the decision to refrain from using herbicides is a matter of United States policy and "is not compelled by the 1907 Hague Regulations, the Geneva Protocol of 1925 or the rules of customary international law." Accordingly, neither the Cramer Opinion nor the Buzhardt Opinion recognizes a universally-accepted prohibition on the use of herbicides.

Plaintiffs' reliance upon the trials at Nuremberg is inapposite for the same reasons. As the District Court correctly noted, the individuals who were found guilty in those criminal proceedings were found to have supplied poisonous Zyklon B gas in World War II concentration camps when "the accused knew that the gas was to be used for the purpose of killing human beings." *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d at 94. Because Agent Orange was "not used as [a] means of directly attacking enemy troops," it was not prohibited by Article 23(e)'s proscription of the calculated use of lethal substances against human beings and its use is distinguishable from the context in which Zyklon B gas was used in World War II.

Other sources of United States policy lend additional support to that conclusion. In 1961, the Secretary of State wrote to President Kennedy to recommend the use of herbicides in Vietnam because "successful plant-killing ops in [Vietnam], carefully coordinated with and incidental to larger ops, can be of substantial assistance in the control and defeat of the [Vietcong]," and "[t]he use of defoliant does not violate any rule of international law concerning the conduct of chemical warfare and is an accepted tactic of war." In 1969, the United States objected to a proposed United Nations resolution that would have "ma[d]e a clear affirmation that the prohibition contained in the Geneva Protocol applied to the use in war of all chemical, bacteriological and biological agents (including tear gas and other harassing agents) which presently existed or which might be developed in the future." The following year, after the United States ceased its use of Agent Orange upon a study revealing its deleterious effects on humans, the Secretary of State wrote a letter to

President Nixon recommending that the President transmit to the Senate for advice and consent the ratification of the 1925 Geneva Protocol. In his letter, the Secretary stated that "[i]t is the United States' understanding of the Protocol that it does not prohibit the use in war of riot-control agents and chemical herbicides." When President Ford ratified the Geneva Protocol in 1975, he clarified that "[a]lthough it is our position that the [P]rotocol does not cover riot control agents and chemical herbicides, I have decided that the United States shall renounce their use in war as a matter of national policy." Moreover, in ratifying the 1925 Geneva Protocol in 1975, the Senate made clear its understanding that the United States' prior use of herbicides in Vietnam had not violated that treaty and that the government intended the Protocol to be only prospective in effect. *See Prohibition of Chemical and Biological Weapons: Hearing on S. Res. 48 Before the Senate Comm. on Foreign Relations*, 93d Cong. 3 (1974) (statement of Senator Humphrey reassuring the Executive Branch that Congress's adoption of the 1925 Geneva Protocol "would in no way reflect on our past practice with regard to chemical agents. The manner in which herbicides and riot control agents were used in Vietnam was fully in accordance with the U.S. [sic] prevailing interpretation of the protocol"). Although Plaintiffs rely on the 1907 Hague Regulations instead of the 1925 Geneva Protocol, it is significant that several nations used poisonous gases during World War I and the contracting parties to the Geneva Protocol found it necessary to adopt such a resolution despite the 1907 Hague Regulations that were in effect.

Plaintiffs' claims that the use of Agent Orange violated the norm of proportionality and caused unnecessary

suffering rely upon international agreements requiring intentionality that Plaintiffs cannot establish. Article 23(e) prohibits the use of "arms, projectiles, or material calculated to cause unnecessary suffering." Article 6 of the Nuremberg Charter proscribes "wanton destruction of cities, towns or villages, or devastation not justified by military necessity." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, Charter of the Int'l Military Tribunal, Aug. 8, 1945, pt. II, art. 6, 59 stat. 1544, 1574, 82 U.N.T.S. 279 ("Nuremburg Charter"). Article 147 of the Fourth Geneva Convention defines "grave breaches" as "willfully causing great suffering or serious injury to body or health," as well as "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." These norms are all simply too indefinite to satisfy *Sosa's* specificity requirement. As Plaintiffs' expert opined, "norms that depend on modifiers such as 'disproportionate' or 'unnecessary' . . . invite a case-by-case balancing of competing interests . . . [and] black-letter rules become vague and easily manipulated. They lose the definite and specific content that *Sosa* seems to demand for recovery under the ATS." Defendants cite to the Final Report of the International Criminal Tribunal for the former Yugoslavia (the "ICTY") Prosecutor on the NATO bombing in Kosovo:

> The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects . . . . It is much easier to formulate the

> principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values.

Final Report to the Prosecutor by the Committee Established to Review the Nato Bombing Campaign Against the Federal Republic of Yugoslavia P48 (June 8, 2000), *reprinted in* 39 I.L.M. 1257, 1271 (2000). The principle of proportionality implicates the element of intent, e.g., "calculated to cause unnecessary suffering," "wanton destruction," "willfully causing great suffering," and "carried out unlawfully and wantonly." *See* 1907 Hague Regulations, art. 23(e). Because Plaintiffs do not allege, nor could they on this record prove, the required mens rea, they fail to make out a cognizable basis for their ATS claim. The purpose behind spraying Agent Orange was only to destroy crops and "to [s]ave the lives of Americans and those of our allies," and not to injure human populations.

Plaintiffs have, at best, alleged a customary international norm proscribing the purposeful use of poison as a weapon against human beings that is inapplicable in this case. We hold that Plaintiffs' claim that "defendants manufactur[ed] and suppl[ied] a[n] herbicide laced with poison" and used as a defoliant fails to satisfy the standard set forth by the Supreme Court in *Sosa* for recognition of a tort in violation of international law and is, therefore, not cognizable under the ATS. *See, e.g., Alvarez-Machain v. United States*, 331 F.3d 604, 620 (9th Cir. 2003) (dismissing cross-border abduction claim, holding: "Because a human rights norm recognizing an individual's right to be free from transborder abductions has not reached a status of

international accord sufficient to render it 'obligatory' or 'universal,' it cannot qualify as an actionable norm under the [ATS]. This is a case where aspiration has not yet ripened into obligation."), *rev'd sub nom Sosa*, 542 U.S. at 692; *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 160 (2d Cir. 2003) (holding that "the asserted 'right to life' and 'right to health' are insufficiently definite to constitute rules of customary international law. . . . [I]n order to state a claim under the [ATS], we have required that a plaintiff allege a violation of a 'clear and unambiguous' rule of customary international law"); *Beanal v. Freeport-McMoran*, 197 F.3d 161, 167 (5th Cir. 1999) (stating that customary international law cannot be established by reference to "abstract rights and liberties devoid of articulable or discernable standards and regulations"). Because we cannot find that Plaintiffs have grounded their claims arising under international law in a norm that was universally accepted at the time of the events giving rise to the injuries alleged, the courts are without jurisdiction under the ATS to consider them. *See Sosa*, 542 U.S. at 725 ("[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.").

Defendants have argued that "civil aiding-and-abetting liability" may not be imposed on corporate entities for violations of the law of war and that, in any event, prudential considerations should preclude adjudication of Plaintiffs' claims. Because Plaintiffs' claims fail to assert a violation of international law norms that are universally accepted and as specific as the paradigmatic

norms identified in *Sosa*, thereby resulting in a failure to establish a cognizable cause of action that gives rise to jurisdiction under the ATS, we need not address these secondary arguments. [5]

III. *Plaintiffs' Claims Arising under Domestic Law*

Plaintiffs argue that the District Court erred in dismissing their state law claims based on the government-contractor defense without discovery on Agents White and Blue, and Plaintiffs incorporate by reference the arguments of appellants United States veterans in the companion case decided herewith. With regard to discovery, Plaintiffs were granted access to the discovery conducted in the companion case brought by the veterans, and the record below shows that additional discovery was conducted on Agents White and Blue. Nevertheless, as set forth in the companion case decided herewith, the government contractor defense operates as a complete bar to Plaintiffs' state law claims. *See In re Agent Orange Prod. Liab. Litig.*, Nos. 05-1760-cv et al., F.3d (2d Cir. Nov. , 2007).

IV. *Plaintiffs' Claims for Injunctive Relief*

The District Court found that the extraterritorial injunction Plaintiffs sought raised concerns over Vietnam's sovereignty and was rendered "wholly impracticable" by the difficulties involved in enforcing an order of abatement and remediation of vast areas of land over which it had no jurisdiction. *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d at 46. Plaintiffs claim that they have adequately alleged an irreparable injury that no legal remedy can address. Plaintiffs further claim that any determination

regarding the practicalities of enforcing an injunction is premature at this stage in the litigation without further evidentiary developments to guide the District Court in fashioning a remedy. The facts relied on by the District Court, however, in denying the requested injunctive relief--notably Vietnam's sovereignty and the court's lack of jurisdiction over the relevant territory--are readily apparent, and Plaintiffs offer no argument as to how further development of the record might guide the District Court in fashioning a manageable and enforceable injunctive remedy. In any event, we find no abuse of discretion in the district court's decision to deny injunctive relief for substantially the same reasons given by the District Court.

CONCLUSION

Because of our disposition on the issues of law in this case, we need not address any of the parties' other contentions on appeal. In accordance with the foregoing, we affirm the judgment of the District Court.

Foonotes

[1]News of the Vietnamese President's visit to the United States in June 2007 confirmed that the United States and Vietnam currently are engaged in diplomatic efforts regarding the Agent Orange issue:

> In the build-up to the hearing, a Vietnamese delegation is touring the United States screening documentaries of disfigurement and other health problems caused by dioxin, a small compound within the 'agent orange' herbicide that is one of the most toxic compounds known . . . . In the past

> year, the two countries have set a new tone in dealing with cleaning up toxins from former U.S. air bases where they were stored in barrels marked with an orange stripe. Government agencies and non-government organizations have plans to start clean-up in the central city of Danang this year. In late May, [President] Bush signed a bill that provides $ 3 million toward health and environment issues stemming from dioxin.

Grant McCool, *Vietnam Leader Visits U.S. for Trade, Other Issues Weigh*, *Boston Globe*, June 14, 2007.

[2]While our Court has over time referred variously to 28 U.S.C. § 1350 as the Alien Tort Statute, *see, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980), the Alien Tort Act, *see, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) and the Alien Tort Claims Act, *see, e.g.*, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007), because the Supreme Court has opted in *Sosa* to refer to § 1350 as the Alien Tort Statute, we think it is preferable to follow that designation.

[3]Plaintiffs do not appear to advance on appeal their international law claims grounded in genocide, crimes against humanity, and torture. Nor do they appear to press any tort claims under Vietnamese law.

[4]The plaintiff in *Sosa* was a Mexican national who had been abducted, held overnight, and transported to the United States to face prosecution on charges of the murder and torture of an agent of the federal Drug Enforcement Administration. 542 U.S. at 697-98.

Defendant Sosa was a Mexican national who allegedly had participated in the abduction. After being acquitted on the charges against him, the plaintiff brought an action under the ATS against Sosa, and others alleging that his abduction constituted tortious conduct under the ATS. *See id.* at 698-99. On appeal, the Supreme Court considered whether the law of nations included "a general prohibition of 'arbitrary' detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances." *Id.* at 736. Applying the standard set forth in its opinion, the Court considered several sources of international law and ultimately held that "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy [under § 1350]." *Id.* at 738. Noting that the plaintiff's claim advanced "an aspiration that exceeds any binding customary rule having the specificity we require," the Court concluded that "[c]reating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise." *Id.* at 738.

[5]After the filing of briefs and oral argument in this appeal, this Court addressed in a different case whether a district court had subject matter jurisdiction over ATS claims alleging that domestic and foreign corporations aided and abetted the government of apartheid South Africa in committing various violations of customary international law. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (per curiam) (holding that "in this Circuit, a

plaintiff may plead a theory of aiding and abetting liability under the [ATS]").

05-1509-cv, 05-1693-cv, 05-1694-cv, 05-1695-cv, 05-1696-cv, 05-1698-cv, 05-1700-cv, 05-1737-cv, 05-1760-cv, 05-1771-cv, 05-1810-cv, 05-1813-cv, 05-1817-cv, 05-1820-cv, 05-2450-cv, 05-2451-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In re "Agent Orange" Product Liability Litigation; J. MICHAEL TWINAM, et al Plaintiffs-Appellants,

-v-

DOW CHEMICAL COMPANY, et al., Defendants-Appellees.

June 18, 2007, Argued, Final Submission, August 3, 2007

February 22, 2008, Decided

As Corrected February 25, 2008.

***

JUDGES: Before: MINER, SACK, and HALL, Circuit Judges. SACK, Circuit Judge.

OPINION

SACK, Circuit Judge:

More than thirty-five years ago, the United States military stopped using Agent Orange and related chemicals as defoliants to prosecute the war in

Vietnam. This appeal is but the latest chapter in a thirty-year struggle by the litigants, their counsel, and judges of the United States District Court for the Eastern District of New York and of this Court to bring to just legal closure to the alleged consequences of that use.

We explain below why these sixteen unconsolidated appeals are now before us and why, in our view, the government contractor defense applies to bar these claims. In the course of doing so, we consider the discovery limitations imposed by the district court and that court's denial of the Stephenson plaintiffs' motion to amend their complaint. By an opinion written by Judge Hall also filed today, we decide that those of the sixteen cases that were originally filed in state court were properly removed by the defendants to federal court. A third decision by the panel, written by Judge Miner, addresses the separate issues related to the use of Agent Orange raised on appeal in *Vietnam Assoc. for Victims of Agent Orange/Dioxin v. Dow Chemical Co.*, No. 05-1953-cv.

The plaintiffs pursuing this appeal are United States military veterans or their relatives who allege that myriad injuries, mostly forms of cancer, were caused by the veterans' exposure to the chemical defoliant "Agent Orange" during service in Vietnam.[1] They assert that the district court erred in concluding that the government contractor defense -- which protects government contractors from state tort liability under certain circumstances when they provide defective products to the government -- applied to bar the plaintiffs' claims. The plaintiffs contend further that the district court abused its discretion by denying them

discovery beyond what was available in files from prior Agent Orange litigation. We disagree with the plaintiffs on both counts.

We also conclude that it was error to deny the Stephensons' motion to amend their complaint. In light of our conclusion that the defendants are entitled to invoke the government contractor defense, however, we find the error to be harmless.

We therefore affirm the judgments of the district court in all respects.

BACKGROUND

The cases concerning the United States military's acquisition and use of Agent Orange during the Vietnam War, of which these are but a relative few, and their massive factual records, have been addressed in so many different judicial opinions over the years that we do not attempt even to list them here. *See generally In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d 404, 410-14 (E.D.N. Y. 2004) ("*Agent Orange III Gov. Contractor Def. Op.*"). Neither do we undertake a detailed retelling of the history of or facts underlying this litigation. *See id.* at 407-22 (describing the history of Agent Orange lawsuits brought by Vietnam veterans).[2] Instead, we set forth below only what we think necessary for an understanding of our resolution of these appeals.

Agent Orange was one of several chemically similar herbicides[3] used by the United States government during the Vietnam War in connection with "Operation Ranch Hand," the code name for the military's efforts to

defoliate various areas in Vietnam. *See In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 19 (E.D.N.Y. 2005) ("Between 1961 and 1971, herbicide mixtures . . . were used by the United States and Republic of Vietnam . . . forces to defoliate forests and mangroves, to clear perimeters of military installations and to destroy 'unfriendly' crops, as a tactic for decreasing enemy armed forces[']protective cover and food supplies."). The government purchased the defoliants from the defendants-appellees in the instant appeals pursuant to various government contracts.[4] As the defoliation campaign intensified, many of the contracts were subjected to various government directives entered pursuant to the Defense Production Act of 1950, *see* 50 U.S.C. app. § 2061 et seq., and regulations promulgated pursuant thereto. The government characterized delivery of Agent Orange as part of the prosecution of military action, which enabled the defendants to procure otherwise scarce materials and equipment necessary to produce it. *Isaacson v. Dow Chemical Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 304 F. Supp. 2d at 424-25.

The Agent Orange delivered to the government was a mixture of two different herbicides: 2,4-D (2,4-Dichlorophenoxyacetic acid) and 2,4,5-T (2,4,5-Trichlorophenoxyacetic acid). The contracts required that the chemicals be nearly 100% pure and that they be combined in roughly equal proportions.

The manufacture of 2,4,5-T produced, as a byproduct, trace elements of the toxic chemical dioxin (2,3,7,8-Tetrachlorodibenzo para dioxin (TCDD)). The plaintiffs allege that it is dioxin that caused the injuries of which they now complain.

The amount of dioxin contained in a particular batch of Agent Orange varied depending on the production method used by its manufacturer. *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 150, 173 (2d Cir. 1987) ("*Agent Orange I Settlement Op.*"), *cert. denied*, 484 U.S. 1004, 108 S. Ct. 695, 98 L. Ed. 2d 648 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187, 189 (2d Cir. 1987) ("*Agent Orange I Opt-Out Op.*"), *cert. denied*, 487 U.S. 1234, 108 S. Ct. 2898, 101 L. Ed. 2d 932 (1988). The defendants knew at the time they were manufacturing Agent Orange that dioxin was a byproduct and that it could cause certain kinds of harm under certain conditions. Various government agencies and officers assessed the toxicity of the defoliating agents, including Agent Orange, being used in Vietnam. Precisely what knowledge the government and the defendants possessed and when they came to have it is in dispute.

I. Overview of Agent Orange Litigation

The plaintiffs now before us on appeal represent a small fraction of the many Americans who have pursued legal claims arising out of the government's use of Agent Orange to fight the Vietnam War. *See generally Agent Orange III Gov. Contractor Def. Op.*, 304 F. Supp. 2d at 410-14 (listing more than one hundred Agent-Orange-related decisions); *see also, e.g.*, id. at 407-23 (detailing the history of Agent Orange litigation involving Vietnam veterans). Their claims find their roots in the "*Agent Orange I*" litigation, the veterans' class action begun in the late 1970s and settled in 1984.

In those cases, the Judicial Panel on Multidistrict Litigation designated the United States District Court

for the Eastern District of New York as the Multidistrict Litigation ("MDL") court for all federal Agent Orange-related cases brought by military veterans of various countries. Thereafter, first Judge Pratt and then Judge Weinstein presided over proceedings involving approximately 600 litigants, hundreds of thousands of putative class members, several years of motion practice (including motions for class certification), and one appeal to this Court. On the eve of trial of those cases, the defendants and class representatives reached what was then thought by the parties and the courts to be a final global settlement of Agent Orange-related cases in the amount of $ 180 million. *Agent Orange I Settlement Op.*, 818 F.2d at 152-55.

Because of what we termed "formidable hurdles" to the plaintiffs' claims, *id.* at 174, we affirmed the district court's approval of the settlement at what -- even at a total of $ 180 million -- we termed "nuisance value," equivalent to "at best only a small multiple of, at worst less than, the fees the chemical companies would have had to pay to their lawyers had they continued the litigation." *Id.* at 171. The Plaintiffs in 287 cases opted out of the class and thereby the settlement.

Thereafter, the district court granted the defendants' motion for summary judgment in those opt-out actions "on the alternative dispositive grounds that no opt-out plaintiff could prove that a particular ailment was caused by Agent Orange, that no plaintiff could prove which defendant had manufactured the Agent Orange that allegedly caused his or her injury, and that all the claims were barred by the military contractor defense."*Agent Orange I Opt-Out Op.*, 818 F.2d at 189

(internal citations omitted).

From 1987 through 1997, the settlement fund, which, with interest and other augmentations, eventually grew to about $ 330 million was distributed to, inter alios, some 291,000 class members who filed claims prior to the 1994 cutoff date. *Agent Orange III Gov. Contractor Def. Op.*, 304 F. Supp. 2d at 421. Meanwhile, two sets of plaintiffs who had been members of the original plaintiff class and who were therefore entitled to receive settlement payments, but whose injuries had manifested after their opportunity to opt out of the class action had expired, filed class actions on behalf of themselves and other similarly situated veterans. The district court decided that because the plaintiffs were class members, their claims were barred, and we affirmed. *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1439 (2d Cir. 1993) ("Agent Orange II"), overruled in part on other grounds by *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 34, 123 S. Ct. 366, 154 L. Ed. 2d 368 (2002).

Shortly after the settlement fund distributions were completed, the third, and instant, series of lawsuits was initiated. These were brought by two of the sixteen plaintiffs now before us, the Isaacsons and Stephensons, who had not been members of the original plaintiff class. These veterans and their families alleged injuries that resulted from exposure to Agent Orange but did not manifest until after the 1994 cutoff date for filing settlement claims in the original actions. In a 2001 opinion, we held that the district court had erred in deciding that the plaintiffs' claims were barred by the *Agent Orange I* settlement. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 261 (2d Cir. 2001) ("*Agent Orange*

III").[5] We concluded that a conflict existed between the plaintiffs and the class representatives because the representatives had permitted the settlement fund to terminate without a provision for post-1994 claimants such as these plaintiffs. *Id.* at 260-61 (relying on *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999) and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)). As a result, the plaintiffs were not adequately represented by the class, and *Agent Orange I* did not prevent them from pursuing their claims. *Id.* at 261.[6]

II. The Instant Appeals

On remand, the Stephensons and Isaacsons were eventually joined by fourteen other sets of plaintiffs alleging Agent Orange injuries first discovered after the 1994 cutoff date. The cases were not consolidated, but the district court conducted simultaneous proceedings and applied rulings in the *Stephenson* and *Isaacson* cases to each of the others. Together, the plaintiffs raised three tort claims under various state laws: design defect, failure to warn, and manufacturing defect.

Six days after our mandate issued in *Agent Orange III*, the defendants moved in the district court for summary judgment against the Stephensons and Isaacsons.[7] At about the same time, the Stephensons moved to amend their complaint.

On February 9, 2004, several days after receiving voluminous submissions from the plaintiffs and two weeks after oral argument, the district court issued four decisions, two of which -- one granting the

defendants' motion for summary judgment and the other denying the Stephensons' motion to amend -- are now before us on appeal.[8] Even though only the motions for summary judgment in *Stephenson* and *Isaacson* were before it, the district court considered all the evidence put forth by the parties in *Agent Orange I* in ruling on defendants' summary judgment motion. Having done so, it concluded that the government contractor defense barred both the design defect and failure-to-warn claims. *Agent Orange III Gov't Contractor Def. Op.*, 304 F. Supp. 2d at 441-42. As to plaintiffs' manufacturing defect claims, the court concluded that they were barred because the defendants' products conformed to the government's specifications. *Id.* at 442.

In granting the motion for summary judgment, however, the district court noted that the plaintiffs had complained of "difficulties in obtaining evidence for their position," an "understandable" problem in light of the passage of time between exposure and injury. *Id.* "To ensure due process," *id.*, therefore, Judge Weinstein charted a distinctly unusual course -- he permitted discovery, never undertaken by *Agent Orange III* litigants in light of the timing of prior appeals and the defendants' motion, to continue through August 10, 2004, and he set a motion schedule for an anticipated motion for reconsideration based on the results of that discovery. *Id.*

Thereafter, the district court ordered that all files relating to Agent Orange sent to the National Archives pursuant to court order following *Agent Orange I* be returned to the district court and made available to the plaintiffs for their review. The magistrate judge

assigned to the case then denied all requests for additional non-MDL discovery, although the district court subsequently granted the plaintiffs access to "up to six complete deposition transcripts utilized in non-MDL 381 cases claimed by plaintiffs to shed light on relevant knowledge of defendants."

On November 3, 2004, the plaintiffs in *Stephenson* and *Isaacson*, as anticipated, filed a motion for reconsideration of the district court's order granting summary judgment. On November 16, 2004, the district court, without awaiting response from the defendants, denied the plaintiffs' motion. *In re "Agent Orange" Prod. Liab. Litig.*, 344 F. Supp. 2d 873, 874-75 (E.D.N.Y. 2004). It further ordered the defendants to "submit a specific judgment in favor of each named defendant against each named plaintiff whose claims arise from service in the Armed Forces of the United States," thereby rendering the court's judgment in *Stephenson* and *Isaacson* applicable to each of the fourteen additional plaintiffs now before us on appeal. *Id.* at 875.

Following a motion by the Bauer plaintiffs, who argued that granting the motion for summary judgment was inappropriate because, *inter alia*, the procedural posture of their case had rendered them unable to respond to the defendants' motion, all plaintiffs were ultimately given until February 28, 2005, to submit additional papers supporting their position that summary judgment should not have been granted. Oral argument was held on February 28. On March 2, 2005, the district court summarily reaffirmed its November 16, 2004 Order. *In re "Agent Orange" Prod. Liab. Litig.*, No. 79 MD 381, 2005 U.S. Dist. LEXIS 16154, 2005 WL

483416, at *1 (E.D.N.Y. Mar. 2, 2005). Separate judgments of dismissal in each action were then filed.

More than a year before, in February 2004, the district court had denied the Stephensons' motion to amend their complaint to add additional defendants and several new causes of action. *Stephenson v. Dow Chem. Co.*, 220 F.R.D. 22, 25-26 (E.D.N.Y. 2004). Although the defendants had never answered the Stephensons' original complaint, filed *pro se* in the Western District of Louisiana, the motion to amend was denied on a variety of grounds. *Id.*

The plaintiffs appeal. Before us are challenges to (1) the district court's grant of the motion for summary judgment as to their design claim only;[9] (2) the denial of their requests for additional discovery; and (3) the denial of the Stephensons' motion to amend.[10]

DISCUSSION

I. Summary Judgment

A. Standard of Review

We review the district court's grant of summary judgment *de novo*, "construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor." *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005). "We will affirm the judgment only if there is no genuine issue as to any material fact, and if the moving party is entitled to a judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(c)).

B. The Government Contractor Defense

Almost twenty years ago, in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988), the Supreme Court recognized the government contractor defense, a federal common[11] law doctrine. The Court concluded that the "uniquely federal interest[]" of "getting the Government's work done" requires that, under some circumstances, independent contractors be protected from tort liability associated with their performance of government procurement contracts. *Id.* at 504-05.

The Court looked to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. ("FTCA"), for guidance. *Id.* at 509-12. Under the FTCA, Congress waived sovereign immunity for the government insofar as Congress "authorized damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of Government employees, to the extent that a private person would be liable under the law of the place where the conduct occurred." *Id.* at 511 (citing 28 U.S.C. § 1346(b)). The Act's discretionary function exception, however, carves out from that authorization "'[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.'" *Id.* (quoting 28 U.S.C. § 2680(a))(brackets in original).

The *Boyle* Court concluded that the protection for discretionary action taken by federal agencies and employees implies some measure of similar protection for government contractors even though they are

themselves non-governmental entities. The Court noted that the exercise of government discretion is inherent to military contracting:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.

Id. Accordingly, the Court said,

> permitting "second-guessing" of these judgments through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. . . . To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.

Id. at 511-12 (citation omitted). The defense thus protects government contractors from the specter of liability when the operation of state tort law would significantly conflict with the government's contracting interest. *Id.* at 507.

Adopting the reasoning employed in several previous

court of appeals decisions, the Court limited "the scope of [state law] displacement" to instances in which "(1) the United States approved reasonably precise specifications [for the allegedly defectively designed equipment]; (2) the equipment conformed to those specifications; and (3) the [contractor who supplied the equipment] warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512. The first two requirements "assure that the suit [from which protection is sought] is within the area where the policy of the 'discretionary function' would be frustrated -- i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself." *Id.* The third requirement is imposed because "in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability." *Id.* The Court therefore "adopt[ed] this provision lest [its] effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision." *Id.* at 512-13.

The plaintiffs here contend that the defendants cannot, at least as a matter of law at the summary judgment stage, satisfy any one of the three requirements.

1. Reasonably Precise Specifications.

The plaintiffs argue that the defendants have not established the first *Boyle* requirement -- that "the United States approve[] reasonably precise

specifications," 487 U.S. at 512 -- because: (1) Agent Orange procurement contracts contained no specifications regarding the defective feature, dioxin; (2) there is at least a genuine issue of material fact regarding whether Agent Orange was a commercially available product whose specifications were created by the defendants rather than the government, whose involvement was minimal; and (3) the alleged defect was unrelated to the contractual specifications for 2,4,5-T because it was the defendants' chosen manufacturing processes -- with which the government was not involved and which were not integral to contract compliance -- that caused dioxin to be present.[12]

The first argument concerns the proper conception of the complained-of defect and can readily be resolved. The second and third arguments are, in distinct ways, about how the government exercised its discretionary authority: The second argument asks whether the government was involved in the contractual process to the extent that *Boyle* requires; while the third asks us to determine in what context the government must exercise its discretion for the government contractor defense to apply. To conduct this third inquiry, we must determine the source of the "conflict" between the government's interests and state tort law that is required for the defense to apply.

a. The complained-of defect

The plaintiffs assert that because the contracts at issue contain no specifications whatsoever with regard to the dioxin, the government exercised no discretionary authority over that which is the subject of their state tort litigations, as a successful defense based on *Boyle*

requires. Their argument misconceives the nature of what the contracts in question were about and defines the alleged defective design too narrowly.

The contracts at issue provided for the defendants to supply Agent Orange. The Agent Orange was allegedly defective because it contained excessive trace amounts of dioxin, which were present as a result of the manufacture of a specified Agent Orange component, 2,4,5-T. The dioxin -- while a defect of 2,4,5-T -- was not itself defective, nor did it exist within Agent Orange apart from the 2,4,5-T therein.[13] It was therefore the 2,4,5-T that was alleged to be defective, not the dioxin.

b. The government approved specifications for a uniquely tailored product

The plaintiffs contend that the defendants cannot demonstrate that the government exercised its discretionary authority to create the Agent Orange specifications that are contained in the contracts. The government contractor defense protects federal contractors solely as a means of protecting the government's discretionary authority over areas of significant federal interest such as military procurement. Defendants asserting the defense must demonstrate that the government made a discretionary determination about the material it obtained that relates to the defective design feature at issue. Where the government "merely rubber stamps a design, . . . or where the [g]overnment merely orders a product from stock without a significant interest in the alleged design defect," the government has not made a discretionary decision in need of protection and the defense is therefore inapplicable. *Lewis v. Babcock Indus., Inc.*,

985 F.2d 83, 87 (2d Cir.) (citing *Trevino v. Gen. Dynamics Corp.*, 865 F.2d 1474, 1480, 1486 (5th Cir.), *cert. denied*, 493 U.S. 935, 110 S. Ct. 327, 107 L. Ed. 2d 317 (1989), and *Boyle*, 487 U.S. at 509) (internal quotation marks omitted), *cert. denied*, 509 U.S. 924, 113 S. Ct. 3041, 125 L. Ed. 2d 727 (1993). If the government buys a product "off-the-shelf" -- "as-is" -- the seller of that product cannot be heard to assert that it is protected from the tort-law consequences of the product's defects. Where the government is merely an incidental purchaser, the seller was not following the government's discretionary procurement decisions.

Here, the plaintiffs contend that the government rubber-stamped its approval of the defendants' suggested specifications, which, in turn, were simply combinations of off-the-shelf, commercially available herbicides. They say that Dow Chemical owned the patents for certain aspects of the herbicides' component parts and that many different defendants manufactured and sold 2,4,5-T and 2,4-D in various combinations as early as 1948, with some of the formulations including the same 50% mixture as Agent Orange. As a result, the plaintiffs assert, there are at least triable issues of fact as to whether (1) Agent Orange and related herbicides were "stock" products, rather than products tailored to the government's needs; and (2) even if the herbicides were not commercially available products, Agent Orange's components were devised by the defendants without the significant government input necessary to meet the first *Boyle* requirement.

As to the former, the plaintiffs do not dispute the defendants' assertions that 2,4,5-T and 2,4-D were not commercially available at the same high concentrations

as that contained in Agent Orange. The Stephensons, for example, concede that 2,4,5-T was not commercially available in concentrations greater than 55%. *See* Final Reply Br. for Pl.-Appellants, 05-1760-cv, at 67-68. Agent Orange, by contrast, contained 2,4,5-T at greater than 90% purity levels. *See, e.g.*, Aff. of William A. Krohley, counsel for defendant Hercules Inc., Oct. 27, 2004 ("Krohley Aff."), Exh. 11 (July 19, 1963 military specification).

Moreover, as the Fifth Circuit aptly noted in unrelated Agent Orange litigation, the fact that a product supplied to the government comprises commercially available component parts says nothing about whether the finished product resulted from the exercise of governmental discretion as to its design. "[A]ll products can eventually be broken down into various off-the-shelf components." *Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 420 (5th Cir. 2001); *see also In re Joint Eastern and Southern Dist. New York Asbestos Litig.*, 897 F.2d 626, 638 (2d Cir. 1990) ("*Grispo*") (Miner, J., concurring) ("[T]he [g]overnment prescription of how [stock] items should be combined and packaged [is] the key to the military contractor defense . . . .").

As to the latter argument -- the plaintiffs' contention that there was no significant government input -- the plaintiffs misperceive the nature of the government involvement necessary to invoke the contractor defense. That the component chemicals were not developed for military use in the first instance, that some aspects of their composition were patented, and that the defendants may have proposed certain specifications to the government, are not determinative. *Boyle* explicitly contemplated

government reliance on manufacturers' expertise in making a fully informed decision as to what to order. *See Boyle*, 487 U.S. at 513. "[I]t is necessary only that the government approve, rather than create, the specifications . . . ." *Carley v. Wheeled Coach*, 991 F.2d 1117, 1125, 28 V.I. 310 (3d Cir.), *cert. denied*, 510 U.S. 868, 114 S. Ct. 191, 126 L. Ed. 2d 150 (1993); *see also Boyle*, 487 U.S. at 513 ("The design ultimately selected may well reflect a significant policy judgment by [g]overnment officials whether or not the contractor rather than those officials developed the design.").

The extent of the defendants' involvement in suggesting specifications or the defendants' reliance on previously attained industry expertise in doing so is thus not conclusive. The government exercises adequate discretion over the contract specifications to invoke the defense if it independently and meaningfully reviews the specifications such that the government remains the "agent[] of decision." *Grispo*, 897 F.2d at 630; *see also Stout v. Borg-Warner Corp.*, 933 F.2d 331, 336 (5th Cir.) (government issued reasonably precise specifications when it reviewed contractor's detailed drawings several times and evaluated test models), *cert. denied*, 502 U.S. 981, 112 S. Ct. 584, 116 L. Ed. 2d 609 (1991); *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir. 1989) (government issued reasonably precise specifications for F-16 fighter aircraft having approved its design following "continuous back and forth" with contractor), *cert. denied*, 494 U.S. 1030, 110 S. Ct. 1479, 108 L. Ed. 2d 615 (1990).

With respect to Agent Orange, the record contains, for example, a memorandum dated February 22, 1963,

regarding "Ester Specifications for U.S. Army Biological Laboratories," written by an employee of one of the defendants, that discussed a February 8, 1963, meeting called "to satisfy the U.S. Army about specifications and typical physical properties on the next type of blend they [sic] will be purchasing." Mem. from I.F. Hortman to, *inter alios*, S.D. Daniels and W.A. Kuhn (Feb. 22, 1963), at 1. It indicated that an effort to permit use of a different n-butyl ester from 2,4,5-T was "impossible at this time because the Army had studied only the normal esters," and that, therefore, the chemical company would have to present the proposed change directly to "the commanding officer, U.S. Army Biological Laboratories and Dr. Charles Minarick, Chief of Crops Division" for approval. *Id.* And notes from a 1968 meeting between government officials and representatives of several of the defendants indicate that the government insisted on a test for chemical composition despite "much resistance to this added requirement on the part of the Industry [sic]" as well as on a 98% purity level for the 2,4,5-T ester. Memorandum of R.A. Guidi, Diamond Alkali Co. (Feb. 20, 1968), at 1-2.

We conclude, based on the evidence in the extensive record that has been brought to our attention,[14] that no reasonable jury could find that the government did not exercise sufficient discretion for it to have been said to have "approved" specifications for the herbicides. The government was plainly the "agent[] of decision," *Grispo*, 897 F.2d at 630, with respect to Agent Orange's contractually specified composition.

c. The government made a discretionary determination regarding Agent Orange's toxicity

The next question, and we think it to be a more difficult one, is whether the government made a discretionary determination that created the conflict between the federal government's interests and the defendant's state law duties that is necessary to invoke the government contractor defense. The plaintiffs argue that the defendants could have manufactured Agent Orange that produced either dioxin-free or nearly dioxin-free 2,4,5-T by employing the lower-temperature manufacturing process developed and used by a German manufacturer, C.H. Boehringer Sohn. This process, the plaintiffs say, would have permitted the defendants to comply with their federal contractual duties and deliver a less toxic defoliating agent, albeit at a somewhat slower rate. As a result, the plaintiffs argue, the defendants could have met both their federal duties and their state tort-law duties; the direct conflict contemplated by *Boyle* is absent; and the first requirement for the contractor defense therefore cannot be established.[15]

(i) *Analysis.* In determining whether the government made a discretionary decision that would create the type of conflict between tort law and government interests contemplated by *Boyle*, we are not called upon to assess the merits of the alleged state tort law violation.[16] We are tasked only with determining whether the government's discretionary actions with respect to the allegedly defective design and the *alleged* state law tort duty conflict. If they do, the first *Boyle* requirement is met; if they do not, the government contractor defense does not apply, and we must return the case to the district court for trial on its merits. *Cf. Grispo*, 897 F.2d at 627 n.1 (noting that appeal of summary judgments pertaining to

applicability of the contractor defense did "not raise the question whether New York law imposes a duty to warn under the[] facts [of the case], or whether a failure to warn was the proximate cause of the [plaintiffs'] alleged injuries.").

The first *Boyle* requirement is designed to ensure that "a conflict with state law exists." *Lewis*, 985 F.2d at 86. We have observed that, therefore, "answering the question whether the [g]overnment approved reasonably precise specifications for the design feature in question necessarily answers the question whether the federal contract conflicts with state law." *Id.* at 87. If such specifications are present, the contractor's federal contractual duties will inevitably conflict with alleged state tort duties to the contrary because complying with the federal contract will prevent compliance with state tort law as the plaintiffs have alleged that it exists. *See id.* Alternatively, where a "contractor could comply with both its contractual obligations and the state-prescribed duty of care," displacement "generally" would not be warranted, and state law would apply. *Boyle*, 487 U.S. at 509.

The defendants do not contest that the government's contractual specifications for Agent Orange were silent regarding the method of manufacture or that the government harbored no preference, expressed or otherwise, regarding how the herbicides were to be produced. *See, e.g.*, Appellees' Br. at 36-37. Indeed, they admit that they were under no federal contractual duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the resulting toxicity levels. *See id.* at 96-97, 99 (characterizing lack of specifications regarding method

of manufacture or toxicity levels as discretionary omission and conceding that "omitted specifications do not constitute contractual duties"). The defendants argue instead that the government's Agent Orange procurement contracts nevertheless created a conflict with their alleged state tort duty to manufacture the herbicides differently. The defendants reason that the documentary evidence establishes as a matter of law that the manufacture of dioxin-free Agent Orange was impossible and that, in any event, they could not have complied with their procurement contracts with the government had they used the slower, less efficient, Boehringer method. They contend further that the government ordered the herbicides with full knowledge of the relevant dangers, which, they say, is equivalent to the government having approved a reasonably precise specification about that danger. *Id.* at 91-99, 102-04.

But the documents cited by the defendants as to the inevitability of dioxin content in Agent Orange -- including declarations by the Environmental Protection Agency that dioxin in some very small amounts was "unavoidable" and that the "potential risks" of harm to humans outweighed any benefits of continued use of commercially available 2,4,5-T, *see* EPA Notice of the Denial of Applications for Federal Registration of Intrastate Pesticide Products Containing 2,4,5-T, 45 Fed. Reg. 2,898, 2,899 (Jan. 15, 1980); EPA Decision and Emergency Order Suspending Registrations for the Forest, Rights-of-Way, and Pasture Uses in 2,4,5-T, 44 Fed. Reg. 15,874, 15,874 n.1 (Mar. 15, 1979) -- do not refute what we understand to be the thrust of the plaintiffs' argument: that had the defendants used the Boehringer method, the Agent Orange they produced

would have contained no then-detectable amounts of dioxin. In that event, the plaintiffs allege, the lower levels of dioxin would have avoided much, if perhaps not all, of the harm allegedly suffered as a result of the presence of dioxin in Agent Orange.

The documents submitted to the district court also do not establish as a matter of law that there was an inherent conflict between use of the Boehringer process and compliance with defendants' contractual obligation to the government. Dow Chemical adopted and used the Boehringer method, or something like it, *see* Mem. from J.D. Doedens, Chemicals Dep't, Dow Chem. Co. (Mar. 1, 1965), at 2; Mem. from Alex Widiger, Midland Division Research & Dev., Dow Chem. Co. (Apr. 25, 1967), at 2, at the time the government was requesting Agent Orange in increasing quantities and sequestering the entire domestic market for 2,4,5-T. This change in manufacturing method and its timing at least raises a triable issue of fact as to whether the defendants could have complied with their contractual obligations to the government while using what the plaintiffs contend was a process that would have resulted in a defoliating agent substantially less dangerous to military personnel.

And so we must determine whether the government did in fact, as the defendants argue, approve of the toxicity levels present in Agent Orange in a manner that would create the necessary conflict with the alleged state law tort duty such that the latter must be displaced. We think that it did.

We have previously concluded that where the government contracts for the purchase of a product

with knowledge that the product has an arguable defect, it is considered to have approved "reasonably precise specifications" for that product, with the known defect, for purposes of the first *Boyle* requirement. *Lewis*, 985 F.2d at 89. In *Lewis*, the government reordered a cable that connected a parachute to the crew module of an Air Force fighter jet with knowledge that the coating that protected the steel cable was prone to cuts, resulting in cable corrosion. *Id.* at 85. Although the government during its initial order had not made a discretionary decision about which materials should be used in constructing the cable, it subsequently ordered replacement cables even after an Air Force investigation into the corroded cables had revealed the problem with the protective coating, reasoning that changes to its maintenance manual would sufficiently alleviate the risk of harm. *Id.* In light of this considered attention by the government to the precise defect alleged, we concluded that the cable could not be characterized as a stock item and that the "contractor's decision regarding the materials to be used for the cable" could not be "second-guess[ed]." *Id.* at 89. We did not discuss whether or how the contractor had been alerted to the government's investigation or the reasons for its reordering, nor whether the contract for replacement cables also omitted reference to the material used to construct them, as had the original cable contract. "Based on the reorder" alone, we said, "the contractor c[ould] claim: 'The [g]overnment made me do it.'" *Id.* (quoting *Grispo*, 897 F.2d at 632).

Here, similarly, the record discloses that the government explicitly evaluated the alleged design defect (toxic 2,4,5-T), and thereafter continued to order "replacement" herbicides. The government examined

the toxicity of what the plaintiffs contend was the most toxic Agent Orange variant used in Vietnam -- Agent Purple -- and determined that it posed no unacceptable hazard. *See* Tr. of Oral Arg. at 24 (plaintiffs' attorney's comments regarding Agent Purple's toxicity). On April 26, 1963, the Army conducted a meeting at its Edgewood (Maryland) Arsenal "to evaluate the toxicity of a[n herbicide] mixture known as 'Purple.'" Minutes of a Meeting Held to Discuss and Evaluate the Toxicity of 2,4-D and 2,4,5-T Compounds (Apr. 26, 1963) ("April 1963 Meeting Minutes"), at 3. Their analysis required reaching a conclusion "about dose levels and hazards to health of men and domestic animals from 2,4-D and 2,4,5-T based on the medical literature and unpublished data of various research laboratories." *Id.* Those in attendance included officials from various branches of the military and various other government agencies, and representatives from manufacturers Dow Chemical and AmChem Products. *Id.* at 2. The group heard various presentations on the subject. At the end of the meeting, the participants adopted "acute toxicity" figures for Agent Purple. They concluded

> in summary and after careful review of toxicological data related to 2,4-D and 2,4,5-T plus the knowledge as to the manner these materials have been used for defoliation in military situations in Southeast Asia, . . . that no health hazard is or was involved to men or domestic animals from the amounts or manner these materials were used . . . .

Id. at 5. Thereafter, the government continued to contract with the defendants for purchase of the same and similar defoliating agents.[17]

In other words, the Army examined the toxicology data available to it and concluded that Agent Orange's components, 2,4,5-T and 2,4-D -- in the formulation that the government, in its discretion, used when ordering it, and as it was then being manufactured -- posed "no health hazard" and were, at least under the circumstances of international armed conflict, suitable for use in Southeast Asia. Since the government continued to order Agent Orange after having evaluated its toxicity levels and declared them acceptable, we "cannot second-guess" the manufacturers' decision to produce the agents in the manner that they did. *Lewis*, 985 F.2d at 89. Because "[t]he imposition of liability under state law would constitute a significant conflict with the [g]overnment's decision" that the defoliants used in Vietnam as they were produced by the defendants posed no unacceptable hazard, *id.*, we conclude that the first *Boyle* requirement is met.

(ii) *The* Grispo *language*. There is language in *Grispo* that seems to require something more: that when the government "mak[es] a discretionary, safety-related military procurement decision contrary to the requirements of state law," it "incorporate[] th[e] decision into a military contractor's contractual obligations." *Grispo*, 897 F.2d at 632. But we concluded in *Lewis* that the government's order of replacement Babcock cables with knowledge of the risks to pilots associated with the defect in question was itself sufficient to prevent "second-guess[ing]" of the manufacturer's choice to continue using the same cable coating, even though nothing in *Lewis* suggests either (1) that the government included in the re-order contract a specification instructing that the suspect

material be used, or (2) that the defendant manufacturer had been apprised of the government's investigation of the alleged corrosion problem. *See Lewis*, 985 F.2d at 89 ("We hold that when the [g]overnment reordered the specific Babcock cable, with knowledge of its alleged design defect, the [g]overnment approved reasonably precise specifications for that product such that the manufacturer qualifies for the military contractor defense for *any* defects in the design of that product." (emphasis added)).

Insofar as there is a tension between the two cases, we think it is resolved by *Boyle*. In framing the first *Boyle* requirement, the *Boyle* Court sought to "assure that the suit [in which the contractor defense is asserted] is within the area where the policy of the 'discretionary function' would be frustrated" absent the availability of the defense. *Boyle*, 487 U.S. at 512. Although the Court used the term "reasonably precise specifications," we think that, as in *Lewis*, reordering the same product with knowledge of its relevant defects plays the identical role in the defense as listing specific ingredients, processes, or the like.

In *Boyle*, the alleged state law duty of care was "precisely contrary to the duty imposed by the [g]overnment contract." *Id.* at 509. But the opinion did not hold that a conflicting, express contractual duty was required for the contractor defense to preempt state law. The issues as framed by the *Boyle* Court were not narrowly about duties imposed by contract; they were more broadly about federal policies and interests and the exercise of federal discretion, in the face of contrary state law, in furthering them. *See* id. at 507

("Displacement will occur only where . . . a 'significant conflict' exists between an identifiable '*federal policy or interest* and the [operation] of state law.'" (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68, 86 S. Ct. 1301, 16 L. Ed. 2d 369 (1966) (brackets in original) (emphasis added)); *see also* id. at 509 (stating that even where federal contractual and state tort duties were "precisely contrary," "it would be unreasonable to say that there is always a 'significant conflict' between the state law and a *federal policy or interest*" (emphasis added)).

The government's "uniquely federal interest," *id.* at 504, in fully taking advantage of its ability to determine what level of risks and dangers must be tolerated in order to achieve a particular military goal need not be belabored. *See Agent Orange I Opt-Out Op.*, 818 F.2d at 191 ("Civilian judges and juries are not competent to weigh the cost of injuries caused by a product against the cost of avoidance in lost military efficiency. Such judgments involve the nation's geopolitical goals and choices among particular tactics . . . ."). We pause only to note that the federal interest implicated by the lawsuits here is not only the ordinary need to ensure the government's "work" gets "done," *Boyle*, 487 U.S. at 505, but the ability to pursue American military objectives -- in this case, protection of American troops against hostile fire.

The government made an express determination, based on the knowledge available to it at the time, that Agent Orange as then being manufactured posed no unacceptable hazard for the wartime uses for which it was intended, and that the product should continue to be manufactured and supplied to it. In light of this

exercise of discretion, we read *Boyle* to require displacement of any alleged state law rules to the contrary.[18]

2. *Compliance with Specifications.* The plaintiffs' challenge to the defendants' ability to demonstrate the second requirement for *Boyle* protection -- compliance with the contracts' specifications -- does not warrant extensive discussion. Nothing about the presence of dioxin in trace amounts within the 2,4,5-T component of Agent Orange rendered the Agent Orange delivered to the government non-compliant with its contractual obligations. The plaintiffs' own expert agrees. *See* Aff. of Harry Ensley (Feb. 6, 2004), at ¶ 20 ("[T]he 2,4,5-T the government purchased could contain varying amounts of such impurities as . . . dioxin . . ., yet still be in compliance with the government's specifications . . . ."). There is no allegation that the government received Agent Orange with 2,4,5-T present in anything other than the proportions and purity levels called for by the terms of the contracts. The second requirement is therefore met as a matter of law. *See Miller*, 275 F.3d at 420-21 (rejecting same argument made by civilian plaintiffs seeking compensation for injuries allegedly caused by Agent Orange).

3. *Defendants' Warnings About Known Dangers.* The final *Boyle* requirement for the invocation of the government contractor defense is that the defendants demonstrate that they "warned the United States about the dangers in the use of the equipment that were known to [them] but not to the United States." *Boyle*, 487 U.S. at 512. The plaintiffs make essentially two arguments in this regard: (1) that the defendants knew more about the hazards of 2,4,5-T than did the

government, but failed to warn the government about them; and (2) that even if some members of the government had some knowledge regarding the dangers of dioxin, *Boyle* requires that for the defense to be applicable, the actual contracting officials must have such knowledge, and those involved in the specification process for Agent Orange knew nothing about 2,4,5-T's hazards.

The thrust of the defendants' response is that (1) none of the plaintiffs claim an injury of the sort that was a danger known by anyone at the time of Agent Orange's production; (2) as to dangers about which the defendants were aware, the evidence demonstrates as a matter of law that they shared that knowledge with the government; and (3) irrespective of what the defendants knew about Agent Orange in general, the government had far greater knowledge than the defendants about Agent Orange and the dangers posed by its intended use in Vietnam.

We doubt that the defendants can establish as a matter of law on the present record either the second or third of their contentions -- that they shared the knowledge of dangers of which they were aware with the government and that the government had far more knowledge about the dangers of Agent Orange in its planned use. Each is intensely factual and hotly disputed.[19] We think that the record is clear, however, that the defendants did not fail to inform the government of known dangers at the time of Agent Orange's production of the type that would have had an impact on the military's discretionary decision regarding Agent Orange's toxicity. We therefore

conclude that the defendants have established *Boyle's* third requirement as a matter of law.

Boyle mandates that to obtain the benefit of the government contractor defense, a contractor must inform the government about known "dangers in the use of the equipment." *Boyle*, 487 U.S. at 512. But the *Boyle* Court was silent as to what types of risks rise to the level of dangers that must be disclosed. Prior to *Boyle*, we were of the view that manufacturers need disclose to the government only those hazards that (1) are "based on a substantial body of scientific evidence"; and (2) create dangers likely "serious enough to call for a weighing of the risk against the expected military benefits," that is, "substantial enough to influence the military decision to use the product." *Agent Orange I Opt-Out Op.*, 818 F.2d at 193. Until now, neither we nor the Supreme Court has been called upon to decide, *post-Boyle*, what constitutes "knowledge" of a "danger" that would trigger a duty to inform as to the "equipment" being ordered.

This much is plain: *Boyle* did not contemplate requiring disclosure of any and all potential risks by the contractor to the government, irrespective of their relation to the governmental discretionary decision at issue. The *Boyle* Court was concerned primarily with protecting the government's ability to assume certain kinds of risks without assuming the costs of liability for those risks. *See Boyle*, 487 U.S. at 511-12. It protected this ability by ensuring that where the government accepts such a risk knowingly, a state law that would require finding that same risk unacceptable must be displaced. We therefore do not think that the *Boyle* Court meant that a defendant seeking the protection of

the defense was required to demonstrate that it had shared all known hazards with the government, irrespective of whether those hazards allegedly not conveyed would have had an impact on the government's exercise of discretion about the design defect alleged. It would be impractical to require that a manufacturer compile and present to the government in advance a list of each and every risk associated with a product it is producing for the government. The operation of a tank or a transport plane -- more so the manufacture and use of a chemical agent -- involves, at the extremities, virtually limitless risks. Even if it were possible to generate such complete lists, their comprehensiveness would overwhelm government decision makers with largely irrelevant data, extending the time and costs associated with federal contracting and obscuring those risks most likely to have an impact on contracting decisions. A rule that required full disclosure of all possible risks to *anyone* would be contrary to *Boyle's* underlying rationale of protecting the federal interest in "getting the Government's work done." *Id.* at 505.

We therefore adhere to our *pre-Boyle* precedent. We conclude, much as we did before *Boyle* was decided, that a defendant may satisfy the third *Boyle* requirement if it demonstrates that it fully informed the government about hazards related to the government's exercise of discretion that were "substantial enough to influence the military decision" made. *Agent Orange I Opt-Out Op.*, 818 F.2d at 193. The defendants can demonstrate a fully informed government decision by showing either that they conveyed the relevant known and "substantial enough" dangers, *id.*, or that the government did not need the

warnings because it already possessed that information, *see Lewis*, 985 F.2d at 89-90 ("There is no requirement that appellees inform the Air Force of dangers already known to the Air Force.").

Here, the plaintiffs allege that the defendants knew of dioxin's hazards but failed to inform the government of them. The documents to which they cite for this proposition, however, pertain almost universally to the risk of chloracne (a severe skin disease) and liver damage to workers manufacturing Agent Orange. These risks, the manufacturers thought, were created by the dioxin "impurity" that resulted from producing trichlorophenol, a component of 2,4,5-T. *See, e.g.*, V.K. Rowe, Test. for the 2,4,5-T Hr'g (undated), at 28 (referring to dioxin build-up in trichlorophenol manufacture), PA 3501-02.; Mem. of V.K. Rowe, Dow Chemical Co., at 1 (Jun. 24, 1965) ("Rowe Jun. 1965 Mem.") (referring to dioxin "impurities" present in trichlorophenol that could be "carried through into the T acid").

There is, indeed, ample evidence that the defendants were concerned about the health effects of dioxin, specifically chloracne[20] and liver damage,[21] on their workers. Tests were conducted that involved exposing animals to pure dioxin, which revealed some "severe response[s]," *see* Report on the Chloracne Problem Meeting on March 24, 1965 (Mar. 29, 1965) ("Mar. 29 Report"), at 5; similar tests performed on humans some years later using a one-percent dioxin solution that resulted in skin lesions, *see* Letter of Albert M. Kligman to V.K. Rowe, Dow Chemical Co. (Jan. 23, 1968) PA 3732. At least two defendants considered whether the dioxin in trichlorophenol's manufacture

would be manifest in the trichlorophenol itself or in the end products containing trichlorophenol, *see, e.g., id.* at 4; Mem., Dow Chem. Co. (Mar. 10, 1965) ("Mar. 10 Dow Mem."), Mem. from E.L. Chandler, Diamond Shamrock Co. ("Chandler Mem.") (Jul. 9, 1962), but the danger with which they were concerned was limited to the possibility of a chloracne outbreak among those handling it, *see* Mar. 10 Dow Mem. (discussing possible need to take precautions that would "prevent injury" akin to what had been taken following past incidents of chloracne outbreaks); Chandler Mem. (indicating two commercial customers had claimed chloracne problems with "Diamond esters," one of which had no similar problems with other manufacturers' product). There is no evidence to which we have been directed or that we have otherwise found that the defendants' knowledge of 2,4,5-T's risks extended to dioxin as a carcinogen, as a toxin that potentially might cause diseases long after exposure, or as a significant health risk (apart from chloracne) to those exposed to herbicides containing 2,4,5-T being used as such, in wartime conditions or otherwise, except for workers manufacturing them or their component chemicals.[22]

How much the government knew about the workplace dangers associated with production of 2,4,5-T while it was considering the use of and ordering Agent Orange is unclear. The minutes from the 1963 meeting at Edgewood Arsenal contained references to a lack of workplace incidents involving 2,4-D and 2,4,5-T. April 1963 Meeting Minutes at 4, Appendix A. The domestic safety record of herbicides containing these two chemicals, including the manufacturers' alleged reports to the Department of Agriculture regarding the absence of ill effects from the herbicides on their

workers, was also relayed to the President's Science Advisory Committee in a May 1963 briefing entitled "Possible Health Hazard of Phenoxyacetates as Related to Defoliation Operations in Vietnam." At least two domestic manufacturers, however, had already experienced chloracne breakouts and other problems among its workers.

The documents make clear, however, that the military was concerned about the likely effect on those exposed to the herbicides in the manner in which they were, and were to be, used in Vietnam. This is hardly surprising. The principal purpose of Agent Orange was to attempt to protect American troops from attack by limiting vegetation around American facilities and emplacements that could provide cover to enemy combatants. To that extent, the chemical agents were to be used on American and allied positions, not those of the Viet Cong.

And the undisputed record with respect to dangers that were posed by the use of Agent Orange is that during the entirety of the production of Agent Orange, the defendants knew only that it was possible that those handling herbicides containing 2,4,5-T might develop the skin disease chloracne. The Edgewood participants, including delegates from various branches of the government, military and civil, were aware of this type of risk. *See* April 1963 Meeting Minutes at 5 (AmChem representative related experiences of "industrial firms making . . . continuous field applications over very large areas" and noted "skin sensitization was the maximum effect produced" in "probably one out of a thousand persons"). Yet the government continued to order

Agent Orange in the manner specified in the procurement contracts.

If the government had decided to manufacture Agent Orange, as it considered doing for a period during the late 1960s, the defendants might well have been required more fully to inform the government of all the possible dangers associated with the manufacture of the chemical (none of them, incidentally, being malignancies). The record suggests that they were prepared to do so. *See* "Plan 'Orange' Production," Dow Chemical Co. (Apr. 20, 1967), at 3 (stating that "[a] serious potential health hazard to production workers is involved in the production of 2,4,5-T" and noting that its "knowhow regarding elimination of the hazard" could be made available to the government), attached to Letter from A.P. Beutel, Vice Pres., Dir. of Gov't Affairs, Dow Chemical Co., to H.G. Fredericks, Deputy Dir. of Procurement and Production, Edgewood Arsenal (Apr. 20, 1967).

We conclude, however, that no reasonable factfinder could find that the defendants had knowledge of a danger that might have influenced the military's conclusion that "operational use" of Agent Orange posed "no health hazard . . . to men or domestic animals," April 1963 Meeting Minutes, at 3, 5, and its presumably related decision to continue to purchase Agent Orange as it was then being produced by the defendants. We find nothing in the record to support an assertion that the defendants "cut[] off information highly relevant to . . . discretionary decision[s]" of the government, *Boyle*, 487 U.S. at 513, i.e., that they possessed knowledge of dangers unknown to the government that, had they been shared, might have influenced the government's

decision regarding the extent of the hazard posed by use of Agent Orange or its choice to continue its use.

We acknowledge that there may well have been some aspects of the dangers of Agent Orange resulting from the trace presence of dioxin that personnel of one or more of the defendants were aware of that members of the military may not have known, at least contemporaneously. We cannot conceive of a long-term relationship between the military and a civilian contractor in which complete equivalence of knowledge at all times in the relationship can be expected or could be established. But nothing in the record of which we are aware would create a triable issue of fact as to whether there was never-disclosed knowledge of a sort that might have influenced the government's decision-making process regarding Agent Orange as it was used in Vietnam.

Accordingly, we conclude that the defendants have established as a matter of law the third requirement of *Boyle.*

***

We feel obliged to note, finally, what seems to us to be obvious: The question raised by government contractor defense cases arising in the context of contracts for military agents and equipment is the extent to which contractors are protected when they provide materials designed to assist the government in obtaining what are ultimately military objectives -- in this case the principal objective being to protect members of the armed forces from enemy attack. Considerations of the validity of those objectives and the reasons for which

the military seeks them are far beyond the competence of this Court. Our determination as to the protection of a military contractor must be made using the same principles regardless of the nature of the military conflict in which they are pursued, or the extent to which it is controversial or enjoys popular support.

II. Discovery Rulings

The plaintiffs also appeal from the discovery limitations imposed by the district court during the months following its initial February 9, 2004, decision granting the defendants' motion for summary judgment. We review discovery rulings for abuse of discretion. *Wood v. FBI*, 432 F.3d 78, 82 (2d Cir. 2005).

As we have noted, the district court's February 9, 2004, government contractor defense opinion granted the plaintiffs a six-month discovery period and permission to seek reconsideration of its summary judgment ruling. Shortly thereafter, the plaintiffs requested "the documents from all of the other litigation that these [defendants] have been involved in, involving the same pesticides and the same type of claims." Tr. of Civil Conference Before The Hon. Joan M. Azrack at 10. They did so without having attempted review of the MDL record. *Id.* at 16. The defendants objected on the grounds that documents from other cases were likely to be largely irrelevant to the question of the applicability of the government contractor defense, duplicative of MDL materials where relevant in any event, and overly burdensome to produce. *Id.* at 13-14.

On March 2, 2004, Magistrate Judge Azrack denied the request, ruling that the plaintiffs first had to familiarize

themselves with the MDL record before requesting additional documents. On March 19, 2004, Judge Weinstein granted the plaintiffs access to six deposition transcripts from non-MDL cases.

The plaintiffs now argue that the district court abused its discretion by limiting the plaintiffs to the documents produced in the MDL during the 1980s and six subsequent depositions. They assert that in the intervening period, the defendants have been sued by other end-users of their commercial herbicides, citizens exposed to industrial contamination from the herbicides' production, and their workers. Discovery in these cases, they contend, was more extensive than the discovery against the defendants that occurred during the 1980s and would be germane to the defendants' knowledge of the adverse health effects caused by their herbicides. They list thirteen other cases involving three defendants (Dow Chemical, Monsanto, and Hercules) and various government hearings from which they suspect discovery and papers would be helpful. Beyond broad claims that the discovery in those cases was more focused on the defendants' knowledge as compared with the MDL, however, the plaintiffs do not cite specific bases for a conclusion on our part that the documents would differ materially from the voluminous documents available to them through the MDL. The defendants do not respond to the plaintiffs' discovery-related arguments.

The Federal Rules of Civil Procedure permit parties to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party," Fed. R. Civ. P. 26(b)(1), but a district court may limit discovery if, among other things,

it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit . . . .*Id.* R. 26(b)(2)(C). A district court has wide latitude to determine the scope of discovery, and "[w]e ordinarily defer to the discretion of district courts regarding discovery matters." *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106, 114 (2d Cir. 1992). A district court abuses its discretion only "when the discovery is so limited as to affect a party's substantial rights." Long Island Lighting Co. v. Barbash, 779 F.2d 793, 795 (2d Cir. 1985). A party must be afforded a meaningful opportunity to establish the facts necessary to support his claim. *Id.*

The plaintiffs here have failed to demonstrate that the district court's rulings limiting the scope of discovery constituted an abuse of discretion. We think the district court reasonably concluded that the MDL files were likely the best source regarding the information the plaintiffs' sought: defendants' knowledge of 2,4,5-T's risks at the time of production. The plaintiffs' motion to Judge Azrack was an unlimited and unfocused request for many thousands of additional documents, made without any attempt to review what was already available to them or to tailor their request to materials reasonably expected to produce relevant, non-duplicative information. Accordingly, the district court's limitations were well within its discretion under Rule 26.

III. Stephensons' Motion to Amend

Finally, the Stephensons challenge the district court's denial of their motion to amend their complaint. Federal Rule of Civil Procedure 15(a), as in effect at the time of the court's order, provided that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *Id.* "We review the determination of a district court to deny a party leave to amend the complaint under Fed. R. Civ. P. 15(a) for abuse of discretion." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007).

Here, at the time of the Stephensons' motion, the defendants had not filed an answer to their complaint. *Stephenson*, 220 F.R.D. at 24. Accordingly, the Stephensons were entitled to amend their complaint as a matter of right without leave of the district court, because "a motion is not a responsive pleading," 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1483, at 584 (2d ed. 1990); *see id.* at 586 ("Nor does a summary judgment motion made before responding [to plaintiff's complaint] have any effect on a party's ability to amend under the first sentence of Rule 15(a)."); *accord, e.g.*, *Zaidi v. Ehrlich*, 732 F.2d 1218, 1219-20 (5th Cir. 1984); *Miller v. Am. Exp. Lines, Inc.*, 313 F.2d 218, 218-19 & n.1 (2d Cir. 1963). Because the defendants had not filed a responsive pleading when the Stephensons sought to amend their complaint, the district court erred in denying the amendment.

We conclude, however, that in light of our finding regarding the government contractor defense, the district court's erroneous denial of the Stephensons' motion was harmless. Repleading could not avoid the application of the government contractor defense and, therefore, remand to permit the amendment would be futile. *See Sinicropi v. Nassau County*, 601 F.2d 60, 62 (2d Cir. 1979) (concluding that even if district court had erred in denying motion to amend, any error would be harmless because the proposed amendment would have been barred by *res judicata*), *cert. denied*, 444 U.S. 983, 100 S. Ct. 488, 62 L. Ed. 2d 411 (1979); *cf. Unlaub Co., Inc. v. Sexton*, 568 F.2d 72, 78 (8th Cir. 1977) (concluding any abuse of discretion by district court in failing to permit defendant to amend his answer was harmless because "[n]one of the matters set forth in the proposed amended answer would affect the result").

CONCLUSION

For the foregoing reasons, we affirm the judgments of the district court.

Footnotes

[1]Plaintiff Garncarz is the only plaintiff who alleges harmful exposure to Agent Orange outside of Vietnam. She contends that her husband died from conditions resulting from his exposure to Agent Orange along the Korean Demilitarized Zone. She does not, however, raise any distinct arguments arising out of her husband's alleged exposure in Korea. We therefore consider her case, for present purposes, as indistinguishable from the others before us.

[2]The Court's opinion in *Vietnam Assoc. for Victims of Agent Orange/Dioxin v. Dow Chem. Co.*, 517 F.3d 104, 2008 U.S. App. LEXIS 3737, 2008 WL (2d Cir. 2008), filed today, sets forth in some detail, based on the record in that litigation, the history of the employment of Agent Orange and related chemicals to prosecute the war in Vietnam.

[3]The several formulations were, like Agent Orange, named according to the color-coded band on the drums containing the chemicals. Since Agent Orange was the most widely deployed, the parties refer to all the herbicides collectively as "Agent Orange" unless the particular circumstance requires that the agents be distinguished. We adopt the same convention.

[4]Most of these contracts have been produced to the plaintiffs, but some are difficult to read in the form in which they survive, and, as discussed below, some are missing.

[5]We also held that the defendants had properly removed the *Isaacson* case from state to federal court. *Id.* at 256-57. As explained in the companion opinion, *see Stephenson v. Dow Chem. Co.*, 346 F.3d 19, 21 (2d Cir. 2003), this holding was subsequently vacated by the Supreme Court and remanded to the district court for a further determination as to the propriety of removal. *See Dow Chem. Co. v. Stephenson*, 539 U.S. 111, 112, 123 S. Ct. 2161, 156 L. Ed. 2d 106 (2003).

[6]At oral argument, we requested supplemental briefing on the question of whether we are bound by our decision in *Agent Orange III* to conclude that these plaintiffs are not bound by the settlement agreement

addressed in *Agent Orange I*. We received the parties' submissions on August 3, 2007. In light of our disposition regarding the government contractor defense, however, we decline to reach the issue.

[7]Although not expressly raised by the appellants or noted by the district court, the defendants' Rule 56.1 Statement appears to have been in blatant violation of Local Rule 56.1, which requires summary judgment movants to list each undisputed material fact "followed by citation to evidence which would be admissible . . . ." S.D.N.Y. & E.D.N.Y. Local R. 56.1(a), (d), *available at* http://www1.nysd.uscourts.gov/rules/rules.pdf. The defendants' approach to compliance with this rule has rendered our task of determining on appeal whether there are genuine issues of disputed material fact considerably more difficult than it should have been.

[8]The district court also denied plaintiffs' motion to strike certain of defendants' affidavits and exhibits -- a ruling the plaintiffs did not appeal -- and found removal of the state court cases proper. Judge Hall's companion opinion addresses this latter ruling.

[9]Because the plaintiffs' briefs make no arguments regarding the district court's findings as to their failure-to-warn or manufacturing defect claims, we deem these claims to have been abandoned. *See Hughes v. Bricklayers & Allied Craftworkers Local # 45*,386 F.3d 101, 104 n.1 (2d Cir. 2004).

[10]Not all of the plaintiffs have raised the same arguments on appeal. Because the defendants have grouped the plaintiffs together as one unit in opposing this appeal, and because by Order dated September 15,

2005, we granted the plaintiffs permission to rely on the arguments made by one another, we here treat each issue raised on appeal by one plaintiff, with the exception of the Stephensons' motion to amend, as having been raised by all.

[11]The defense is referred to in the case law as the "government contractor defense" or the "military contractor defense." For purposes of this opinion, we refer to it as either the "government contractor defense" or simply the "contractor defense."

[12]The plaintiffs also complain that because the defendants cannot produce every contract between them and the government for Agent Orange, it is impossible for the defendants to prove what contractual specifications they were subject to under the missing contracts and, therefore, impossible for the defendants to meet their burden of proof under the government contractor defense.

This argument is without merit for many reasons. We note here only that although it is true that a defendant who had no way to demonstrate what specifications were within the contract or contracts at issue would likely have difficulty successfully asserting the contractor defense, the plaintiffs here do not attempt to rely on particular contracts or to distinguish one contract from another. None of their arguments regarding the first *Boyle* prong rely on the specifications of a particular contract versus the specifications of another. The plaintiffs therefore have not demonstrated that the inability to produce each and every contract is relevant to the applicability of the government contractor defense for the Agent Orange

contracts as a whole.

[13]Pure lead, without defect, may be a defect of a child's painted toy.

[14]"Fed. R. Civ. P. 56 does not impose an obligation [on the court considering a motion for summary judgment] to perform an independent review of the record to find proof of a factual dispute." *Amnesty America v. Town of West Hartford*, 288 F.3d 467, 470 (2d Cir. 2002).

[15]The plaintiffs at times refer to the defendants' failure to use the Boehringer process as resulting in a "manufacturing" defect. Not so. The plaintiffs allege a defective process, not that the process used was somehow erroneously applied. They therefore allege a design defect. As the Eleventh Circuit noted,

> [the] distinction between "aberrational" defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. Stated another way, the distinction is between an unintended configuration, [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results[,] [a design defect].

Harduvel, 878 F.2d at 1317 (internal citation omitted).

[16]Although not dispositive here, we nonetheless note that the plaintiffs' argument regarding the defendants' purported failure to use state-of-the-art manufacturing processes would appear problematic in ways that do not affect our decision as to the applicability of the

government contractor defense as a matter of law, but which might present insurmountable obstacles were we to remand for consideration of the plaintiffs' claims on their merits. For example, documents that are part of the record on appeal indicate that the Dow Chemical Company purchased the proprietary information for the Boehringer process in December 1964 and began using it in its chemical plants two years later. *See* Mem. from J.D. Doedens, Chemicals Dep't, Dow Chem. Co. (Mar. 1, 1965), at 2; Mem. from K.E. Coulter, Midland Division Research & Dev., Dow Chem. Co. (Apr. 25, 1967), at 2. The plaintiffs do not explain how they can seek to hold Dow Chemical liable for Agent Orange produced using the method they now contend should have been used by all manufacturers at all relevant times, or how they might seek to distinguish among manufacturers or between particular manufacturers' batches of herbicides in proving that their exposure to the defoliants caused the injuries about which they now complain. *See Agent Orange I Opt-Out Op.*, 818 F.2d at 189 (noting the "undisputed facts that the amount of dioxin in Agent Orange varied according to its manufacturer and that the government often mixed the Agent Orange of different manufacturers and always stored the herbicide in unlabeled barrels"). Nor is it clear that under these circumstances, the defendants' knowledge dating from the late 1950s that the Boehringer plant was using a new manufacturing process would necessarily translate into a state law tort duty to have adopted it themselves.

[17]The government also evaluated the toxic effects of 2,4,5-T at other points during its use in Vietnam. For example, just several weeks after the Edgewood meeting, on May 9, 1963, the President's Scientific

Advisory Committee was briefed on the "Possible Health Hazard of Phenoxyacetates As Related to Defoliation Operations in Vietnam." The Bionetics Study -- a government-sponsored research project that included research into the health effects of 2,4,5-T -- also began in 1963. It was this research that ultimately triggered, among other curtailments of 2,4,5-T's use, cessation of the defoliation campaign. Dr. R.A. Darrow, Fort Detrick, "Historical, Logistical, Political and Technical Aspects of the Herbicide/Defoliant Program, 1967-1971," at 20-22.

[18]We note that the second and third *Boyle* requirements remain essential to proving the government contractor defense even where, as here, the defendants do not rely on a contractual duty to demonstrate the required conflict between federal interests and state law. The government's discretionary determination about the design defect alleged was necessarily made in the shadow of the government's expectations regarding the product it expected to receive. Defendants therefore must demonstrate that the product it delivered to the government was precisely what the government requested. The third prong is likewise unaffected: The government's discretionary determination must be a fully informed one.

[19]We concluded in *Agent Orange I*, based on much the same record now before us, that "the critical mass of information about dioxin possessed by the government during the period of Agent Orange's use in Vietnam was as great as or greater than that possessed by the chemical companies." *Agent Orange I Opt-Out Op.*, 818 F.2d at 193. The Fifth Circuit, relying in large part on our *Agent Orange I* determination, concluded the same.

See Miller, 275 F.3d at 421. But we are required to review the factual record anew as it is presented to us, not as it was presented to a different panel twenty years ago. And we note, as we did in *Agent Orange I*, that we were in 1987 without the benefit of briefing by the parties on this subject. *Agent Orange I Opt-Out Op.*, 818 F.2d at 190.

[20]As to the dangers related to chloracne, the documents submitted show that knowledge of the risk varied among manufacturers. Not all manufacturers had experienced chloracne outbreaks. Among those that did, it was not clear that dioxin was in the final products emanating from the contaminated plant. *See* V.K. Rowe, Test. for the 2,4,5-T Hr'g (undated), at 28-29 (indicating testing of Dow trichlorophenol and 2,4,5-T following 1964 chloracne outbreak in manufacturing plant revealed no "chloracnegens," and that source of outbreak was contaminated waste oil, "not exposure to trichlorophenol"). Dow thought that dioxin concentrations of less than one part per million presented no chloracne hazard to workers or consumers, Rowe Jun. 1965 Mem., at 1, and changed its production process such that the concentration of dioxin in its Agent Orange would be reduced to the point where, in its view, the hazard would be eliminated.

[21]Variance among the defendants regarding their knowledge of the risks of liver damage to humans was similar to that related to chloracne, with some, but not all, of the defendants aware that animal tests showed liver damage was a possible result of direct exposure to dioxin and that there was liver damage among workers engaged in manufacturing 2,4,5-T. There were also isolated instances of other health concerns arising from

manufacturing processes -- for example, temporary nerve damage (Monsanto) and unspecified "systemic injury" (Dow). *See* Deposition Excerpts of Dr. Wallace, at 2468; Rowe Jun. 1965 Mem. at 1. None of the documents reveal knowledge of any such danger to non-workers.

[22]As to the specific subject of dioxin as a carcinogen, the Dow Chemical Company testified before Congress that its numerous tests and experiments regarding dioxin's toxicity did not examine the chemical's carcinogenicity. Test. of Dr. Julius E. Johnson, Vice President, Dow Chemical Co., Apr. 7 and 15, 1970, at 371. The plaintiffs do point us to a memorandum written by Monsanto's medical director, R. Emmet Kelly, in which he expresses the need to "minimize the presence of this known chloracne agent" because dioxin "[v]ery conceivably [could] be a potent carcinogen." Mem. from R. Emmet Kelly, Monsanto Company (Mar. 30, 1965). But this "conception" alone -- without any context as to its basis or the relationship between the harms of dioxin in its pure form versus the trace amounts of the chemical found within Agent Orange -- is not enough to convince a reasonable factfinder that dioxin was a known carcinogen at the time of Agent Orange's production or, more importantly, that the defendants knew that the trace amounts of dioxin in Agent Orange might prove to be a carcinogen for those not involved in its manufacture or direct handling. *See Agent Orange I Opt-Out Op.*, 818 F.2d at 193 ("[T]he fact that dioxin may injure does not prove the same of Agent Orange . . . ."). We express no view regarding whether the defendants might have done more to investigate dioxin's dangers, as it is well beyond the purview of our inquiry. *Cf. Kerstetter v. Pac. Sci. Co.*, 210 F.3d 431, 436

(5th Cir. 2000) (discussing relationship between contractor defense and latent defects).

MDL 381, CV 98-6383 (JBW), CV 99-3056 (JBW)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
In re: "AGENT ORANGE" PRODUCT LIABILITY LITIGATION; JOE ISAACSON and PHILLIS LISA ISAACSON, Plaintiffs, -against- DOW CHEMICAL COMPANY, et al., Defendants, DANIEL RAYMOND STEPHENSON, et al., Plaintiffs, -against- DOW CHEMICAL COMPANY, et al., Defendants.

February 9, 2004, Decided

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OPINION

MEMORANDUM, ORDER, JUDGMENT of DISMISSAL, and STAY in AGENT ORANGE III

Jack B. Weinstein, Senior United States District Judge

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I. Introduction

Plaintiffs, Vietnam veterans, sue manufacturers who supplied Agent Orange, a herbicide used in the 1960s by the United States armed forces as a spray, primarily from aircraft, to reduce foliage behind which the enemy might lurk. They allege that they suffer from diseases that have just recently become apparent, and that the cause of their ailments is the negligence of the manufacturers in delivering to the government Agent Orange containing an unnecessary toxic substance - dioxin. Mistakes in and of Vietnam can be attributed to the United States under at least three presidents. *Cf.*

"The Fog of War" (Sony Classics 2003) (former Secretary of Defense Robert S. McNamara on Agent Orange and related matters). These errors do not form the basis for a tort action by these plaintiffs against these defendants.

In earlier waves of such suits in the 1970s, 1980s and 1990s, the courts concluded that none of the available evidence would support a finding to a more-probable-than-not standard of causality between exposure to Agent Orange and disease (except for a quickly discoverable and curable form of skin irritation, chloracne). The scientific basis for that conclusion of lack of any substantial proof of causality, either general or specific to individuals, remains much the same. *See* Institute of Medicine, Veterans and Agent Orange: Update 2002 (2003).

Congress has now provided for payment to veterans of compensation for a series of diseases presumptively caused by exposure to Agent Orange. *See McMillan v. Togus Regional Office, Dep't of Veterans Affairs,* F. Supp.2d , 294 F. Supp. 2d 305, 2003 U.S. Dist. LEXIS 21914, 2003 WL 22883115 (E.D.N.Y. 2003) ("Based on statistical associations, the Academy's studies have resulted in the creation of presumptions that certain diseases are attributable to Agent Orange for purposes of Veteran's compensation. These 'associations' are not equivalent to cause in a legal sense for such purposes as mass tort liabilities. These presumption decisions are made by the Secretary for Veterans Affairs. A showing of cause to any degree of probability is not required. The result is summarized in the privately funded National Veterans Legal Services Program, Self-Help Guide on Agent Orange, Advice for Vietnam Veterans

and their Families (2000 plus supplement) ("Self-Help Guide"), financed, in part, by this court from proceeds from an Agent Orange Settlement Fund created by contributions from manufacturers of Agent Orange.").

Some three hundred and thirty million dollars was distributed to veterans and their families from an Agent Orange Fund resulting from a class action. Payments into the fund of one hundred and eighty million dollars were made by defendants in the instant case in settlement of the class action designed to terminate any liability they might have -- present or future -- for the production of Agent Orange. *See* Deborah E. Greenspan, Special Master, *In Re "Agent Orange" Product Liability Litigation:* Final Report of the Special Master on the Distribution of the Agent Orange Settlement Fund (1997) ("Final Report"). A total of 105,817 individual veterans' claims were processed, of which 52,220 were approved for payment from the Fund. *Id.* at 30. 24,776 individual appeals were decided by the court and Special Master for Appeals. The Class Assistance Program for members of veterans' families granted funds to programs that served 239,110 members of Vietnam veterans' families. *Id.* at 41. Funds to many Vietnam veterans in Australia and New Zealand were distributed by committees in those countries.

In the present suit, plaintiff Joe Isaacson alleges that he has non-Hodgkin's lymphoma and other ailments that he attributes to exposure to Agent Orange while serving as a crew chief for an attack fighter squadron in Vietnam from 1968 to 1969; his wife sues for loss of consortium. Plaintiff Daniel Raymond Stephenson alleges that he has multiple myeloma, a cancer of the

bone marrow, from exposure to Agent Orange while serving both on the ground in Vietnam from 1965 to 1966 and as a helicopter pilot from 1969 to 1970; his wife and children sue for loss of consortium. These diseases are recognized by the Veterans Administration as presumptively connected to Agent Orange exposure. *See* Self-Help Guide at 5-6. Under the government program, both plaintiff veterans qualify for a veteran's disability benefit regardless of when these diseases first appeared. *Id.* Both veterans allege that they discovered their diseases after the Agent Orange Fund had been fully expended and it was too late to apply for payment as a member of the class; that they had not been properly represented as members of the class; and that the settlement did not bind them.

Plaintiffs claims are based on theories of strict products liability in tort, including design defects, manufacturing defects, failure to warn, breach of implied warranty, negligence, fraud, and misrepresentation. They seek compensatory and punitive damages. All of the claims center on the presence of 2,3,7,8-tetrachlorodibenzo para dioxin ("dioxin") in Agent Orange.

Defendants manufactured and sold Agent Orange to the United States government for use by the military as a defoliant in Vietnam pursuant to contracts they entered into with the government at various times during the 1960s. They contend that dioxin contamination was known to, and considered by, the government in light of all the information then available of the possible hazards it posed, at the time Agent Orange was ordered from defendants and used in Vietnam. They claim that they were ordered by the government to supply the product according to

government specifications; that the material supplied by the defendants was manufactured, mixed, used and marked on government orders and under its supervision; and that the warnings they would have used had a similar product been sold commercially by them were omitted by government direction -- in short, that the government contractor defense applies.

Because the present plaintiffs discovered what they believe to be their Agent Orange-related diseases after the Agent Orange Fund was fully expended, the appellate courts have now held that these post-Fund-discovery plaintiffs are not bound by the class action settlement that created the Fund. *Stephenson. v. Dow Chemical,* 273 F.3d 249 (2d Cir. 2001), *aff'd as to the Stephensons by an equally divided 4 to 4 court and vacated as to the Isaacsons in light of Sygenta Crop Protection, Inc. v. Henson, in Dow Chemical Co. v. Stephenson,* 539 U.S. 111, 123 S. Ct. 2161, 156 L. Ed. 2d 106 (2003).

Defendants might have moved for summary judgment on the ground that plaintiffs could not prove causality, or for other reasons. Instead, they have chosen to seek dismissal based only on the government contractor defense. "If a subsequent summary judgment motion raises different issues, however, including grounds different from those raised in the first motion, it is considered proper and will be reviewed and decided by the court." 3 Moore's Federal Practice § 56.10[7].

Two procedural approaches are at war. First, it is desirable to provide a court with all possible credible bases for disposing of a case on the merits at one time in order to avoid the necessity of successive motions.

Second, it is useful to minimize the burden of a litigation by resolving it on a theory requiring the least expense and consumption of time even though another theory could be established by the available proof. Such tactical courage is unusual since it risks a loss on appeal should only one member of the Court of Appeals panel prefer the basis proferred for finding in the movants' favor, while another would have favored only another basis which was not put forward, and the third member would reject both.

Here the second path is defensible. Were the motion for summary judgment made on the ground of lack of plausible causality evidence sufficient to support a verdict, enormous epidemiological and exposure data as well as details of plaintiffs' service in Vietnam and medical history might need to be explored in pretrial proceedings at great expense to the parties. *Daubert* and other hearings would probably be required. It is much simpler to decide the case in the first instance on the dispositive government contractor defense.

As indicated below, Part VII, *infra*, the court is tentatively ruling on the motion for summary judgment even though it is allowing plaintiffs additional time for discovery. Plaintiffs' contention that they have faced difficulties in obtaining information sufficient to contest the motion appears based in part on the fact that many of the critical acts occurred many years ago. By tentatively deciding the motion now, and permitting discovery over the period requested by plaintiffs, the court focuses the parties' attention on the critical issues and evidence. *Cf. Mason Tenders Dist. Council Pension Fund v. Messera*, 958 F. Supp. 869, 894 (S.D.N.Y. 1997) (denying request for further discovery

when party lacked specificity as to what additional information was required). Normally a court will postpone decision on a summary judgment motion until the completion of discovery. If a court finds, however, that a party cannot present facts sufficient to oppose the motion, it may inter alia "make such other order as is just." Fed. R. Civ. P. 56(f); *see also* 3 Moore's Federal Practice § 56.10[8][a].

The rest of this memorandum is divided as follows: Part II recounts briefly prior Agent Orange litigation; Part III states the facts relating to the government contractor defense; Part IV sets out the law on the government contractor defense; Part V applies the law to the facts; Part VI is the Conclusion dismissing the complaints; and Part VII stays the judgment until the completion of further discovery.

II. Agent Orange Litigations

Litigation arising from claims that Vietnam veterans contracted diseases as a result of defendants' supplying Agent Orange has been extensive. It is briefly summarized below. The docket sheets in this court under MDL 381 (Agent Orange) list almost 17,000 entries (Hon. Sol Schreiber and Hon. Shira A. Scheindlin supervising discovery). In addition there are: hundreds of thousands of inquiries, applications and decisions of the Agent Orange insurance facility; tens of thousands of administrative appeals (Special Master for Appeals W. Bernard Richland); decisions in the operation of the payment plan (Special Masters Kenneth R. Feinberg and Deborah Greenspan); decisions and minutes of the Advisory Committee to the Court of Vietnam Veterans (Charles Timothy

Hagel et al advisors); decisions and minutes of the Advisory Committees on Banks and Investments (Richard J. Davis et al advisors); reports of the banks, investment advisers, the insurance facility, and others; extensive correspondence, books, training guides, brochures, reports and video cassettes for those providing services to families under the direction of the court created Agent Orange facility which dealt with families and social agencies in all the states, Puerto Rico and United States dependancies (Dennis K. Rhodes, administrator); and correspondence reports and orders in connection with services to Australian and New Zealand veterans. These huge files are available in the archival storage of this court and in the National Archives. *See* Final Report.

A. Generally

The current controversy is part of a continuing litigation whose first phase ended in settlement after six years of effort by many lawyers and court officers -- special masters, magistrates, and judges. Among the hundreds of published and unpublished decisions, see *Dow Chemical Co. v. Stephenson*, 539 U.S. 111, 123 S. Ct. 2161, 156 L. Ed. 2d 106 (2003) (per curiam); *Dow Chemical Co. v. Ryan*, 484 U.S. 953, 98 L. Ed. 2d 370, 108 S. Ct. 344 (1987); *Stephenson v. Dow Chemical Co.*, 346 F.3d 19 (2d Cir. 2003); *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 51 Fed. R. Serv.3d 334 (2d Cir. 2001); *Miller v. Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001) (holding that plaintiff's claims were barred by the government contractor defense); *In re "Agent Orange" Prod. Liab. Litig.*, 1999 WL 1045197 (E.D.N.Y. 1999); *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998) (holding that plaintiffs'

claims were barred by the government contractor defense); *Jenkins v. Agent Orange Settlement Fund*, 131 F.3d 131 (2d Cir. Dec 17, 1997) (unpublished disposition); *Addington v. Agent Orange Veterans Payment Program*, 131 F.3d 130 (2d Cir. Nov 24, 1997) (unpublished disposition); *Gough v. Agent Orange Settlement Fund*, 104 F.3d 353 (2d Cir. Nov 05, 1996) (unpublished disposition); *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993); *Ryan v. Dow Chemical Co.*, 781 F. Supp. 902 (E.D.N.Y. 1991) (plaintiffs cannot collaterally attack prior settlement); *In re* Ivy, 901 F.2d 7 (2d Cir. 1990) (MDL Panel had jurisdiction to transfer); *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250 (E.D.N.Y. 1988) (approved settlement and allowed opt-out claimants to be included in class); *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 56 U.S.L.W. 2028, 7 Fed. R. Serv.3d 1091 (2d Cir. 1987) (no abuse of discretion in unsealing documents); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179, 7 Fed.R.Serv.3d 1078 (2d Cir. 1987) (appeal reviewing settlement plan); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194 (2d Cir. 1987) (affirming dismissal of Federal Tort Claims Act claims of servicemen); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 204 (2d Cir.1987); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 210 (2d Cir.1987); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216 (2d Cir.1987); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226 (2d Cir.1987); *In re "Agent Orange" Prod. Liab. Litig.*, 475 F. Supp. 928, 206 U.S.P.Q.2d (BNA) 378 (E.D.N.Y. 1979) (dismissing federal constitutional and statutory claims, reserving possible federal common law claims, denying motion to limit communications to third parties); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 737 (E.D.N.Y. 1979) (finding subject matter

jurisdiction on basis of federal common law issues), *rev'd*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128, 71 L. Ed. 2d 116, 102 S. Ct. 980 (1981); *In re "Agent Orange" Prod. Liab. Litig.* (Callaghan), 1980 U.S. Dist. LEXIS 9874, 1980 WL 324478, 28 Fed. R. Serv. 2d 993 (E.D.N.Y. 1980) (granting motion of terminally ill plaintiff to videotape his own deposition); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp 750 (E.D.N.Y. 1980) (ordering government to refrain from destruction of documents pursuant to internal procedure); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 753 (E.D.N.Y. 1980) (various orders concerning modification of complaint and answers); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 754 (E.D.N.Y. 1980) (ordering videotaped deposition); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 756 (E.D.N.Y. 1980) (establishing agenda for status conference); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 757 (E.D.N.Y. 1980) (requiring plaintiffs to file individual notices to retain right to bring actions against federal government); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980) (dismissing claims against government as third-party defendant, establishing case management plan, conditionally certifying Rule 23(b)(3) class, and denying defendants' motion for summary judgment); *In re "Agent Orange" Prod. Liab. Litig.*, 91 F.R.D. 616 (E.D.N.Y. 1981) (establishing committee to review procedures for videotaped depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 91 F.R.D. 618 (E.D.N.Y. 1981) (allowing motion to amend caption, denying motion to amend complaint, denying defendants' motion for summary judgment on government contractor defense); *In re "Agent Orange" Prod. Liab. Litig.*, 93 F.R.D. 514 (E.D.N.Y. 1982) (allowing defendant to

proceed with scheduled destruction of documents); *In re "Agent Orange" Prod. Liab. Litig.*, 534 F. Supp. 1046 (E.D.N.Y. 1982) (denying reargument on dismissal of government as third-party defendant, denying interlocutory appeal, provisionally dismissing claims against non-manufacturer defendants, denying motion to form steering committee for plaintiffs' counsel, denying motion for decertification of class, deferring decision on statute of limitations issues, and establishing elements of government contractor defense); *In re "Agent Orange" Prod. Liab. Litig.*, 537 F. Supp. 977 (E.D.N.Y. 1982) (provisionally dismissing claims against non-manufacturer defendant); *In re "Agent Orange" Prod. Liab. Litig.*, 94 F.R.D. 173 (E.D.N.Y. 1982) (appointing special master to supervise discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 544 F. Supp. 808 (E.D.N.Y. 1982) (denying motion to disqualify defense attorneys; provisionally dismissing claims against certain non-manufacturer defendants, and denying motion to implead suppliers); *In re "Agent Orange" Prod. Liab. Litig.*, 95 F.R.D. 191 (E.D.N.Y. 1982) (clarifying that denial of motion to implead suppliers was without prejudice); *In re "Agent Orange" Prod. Liab. Litig.*, 95 F.R.D. 192 (E.D.N.Y. 1982) (affirming special master's ruling as to location of depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 578 (E.D.N.Y. 1983) (adopting special master's protective order for discovery of government documents); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582 (E.D.N.Y. 1983) (rejecting first amendment challenge to protective order); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 587 (E.D.N.Y. 1983) (adopting with modifications special master's order regarding videotaped depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 424 (E.D.N.Y.

1983) (adopting protective order); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 424 (E.D.N.Y. 1983) (adopting special master's protective order for Department of Agriculture documents); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 427 (E.D.N.Y. 1983) (adopting special master's procedures for discovery of documents possibly subject to executive privilege); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 541 (E.D.N.Y. 1983) (denying interlocutory appeal of decision deferring certification of class and determination of appropriate notice); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 542 (E.D.N.Y. 1983) (affirming special master's denial of discovery request); *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263 (E.D.N.Y. 1983) (granting summary judgment for four defendants on government contractor defense; denying summary judgment for other defendants); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 522 (E.D.N.Y. 1983) (adopting order of special master concerning discovery of government documents); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 539 (E.D.N.Y. 1983) (adopting special master's order to unseal documents in connection with summary judgment motions); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 554 (E.D.N.Y. 1983) (denying request for reconsideration of order to unseal documents); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 557 (E.D.N.Y. 1983) (ordering special master to review discovery decisions in light of court's decision to try causality and liability issues); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 558 (E.D.N.Y. 1983) (approving special master's order of additional discovery to clarify circumstances surrounding document destruction); In re "Agent Orange" , 570 F. Supp. 693 (E.D.N.Y. 1983) (clarifying program for

discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 571 F. Supp. 481 (E.D.N.Y. 1983) (granting motion of law firm to be relieved as lead counsel for plaintiffs and appointing new plaintiffs' management committee); *In re "Agent Orange" Prod. Liab. Litig.*, 99 F.R.D. 338 (E.D.N.Y. 1983) (approving discovery recommendations of special master); *In re "Agent Orange" Prod. Liab. Litig.*, 99 F.R.D. 645 (E.D.N.Y. 1983) (lifting prior protective order applying to government documents obtained during discovery); *In re "Agent Orange" Prod. Liab. Liab.*, 100 F.R.D. 718 (E.D.N.Y.) (certifying Rule 23(b)(3) and Rule 23(b)(1)(B) classes), *appeal denied*, 100 F.R.D. 735 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 98 L. Ed. 2d 648, 108 S. Ct. 695 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 778 (E.D.N.Y. 1984) (denying motion to implead suppliers of chemical components); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984) (finding national consensus law on issues of liability, government contractor defense and punitive damages); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242 (E.D.N.Y. 1984) (reinstating third-party plaintiffs' claim for indemnity against government with respect to claims of veterans' wives and children), *mandamus denied*, 733 F.2d 10 (2d Cir. 1984), *appeal denied*, 745 F.2d 161 (2d Cir. 1984), *cert. denied*, 465 U.S. 1067, 79 L. Ed. 2d 743, 104 S. Ct. 1417 (1984); *In re "Agent Orange" Prod. Liab. Litig.*, 101 F.R.D. 97 (E.D.N.Y. 1984) (ordering in camera disclosure of names of scientists deleted from government report); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (approving settlement of class action subject to fairness hearings); *In re "Agent Orange" Prod. Liab. Litig.*, 603 F. Supp.

239 (E.D.N.Y. 1985) (dismissing claims of veterans' wives and children against government), *aff'd in part, vacated in part*, 818 F.2d 201 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 98 L. Ed. 2d 648, 108 S. Ct. 695 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985) (modifying protective orders); *In re "Agent Orange" Prod. Liab. Litig.*, 105 F.R.D. 577 (E.D.N.Y. 1985) (affirming with modification magistrate's order that defendants in two non-settled cases produce deponents); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1221 (E.D.N.Y. 1985) (dismissing defendants' claim for indemnity from government for settlement payments to veterans' families), *aff'd*, 818 F.2d 204 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985) (ruling as to admissibility of opt-out plaintiffs' scientific evidence and expert testimony and granting summary judgment in favor of defendants for plaintiffs' failure to establish causation), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234, 101 L. Ed. 2d 932, 108 S. Ct. 2898 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1267 (E.D.N.Y. 1985) (same), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234, 101 L. Ed. 2d 932, 108 S. Ct. 2898 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1285 (E.D.N.Y. 1985) (dismissing action brought by Hawaiian civilians), *aff'd in part, vacated in part*, 818 F.2d 210 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 98 L. Ed. 2d 648, 108 S. Ct. 695 (1988); *In re "Agent Orange" Prod. Liab Litig.*, 611 F. Supp. 1290 (E.D.N.Y. 1985) (dismissing claim of civilian physician for failure to demonstrate exposure to herbicides), *aff'd in part, vacated in part*, 818 F.2d 210 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 98 L. Ed. 2d 648, 108 S. Ct. 695 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y.

1985) (determining class-action plaintiffs' attorney fees and reaffirming settlement); *aff'd in part, rev'd in part,* 818 F.2d 226 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.,* 611 F. Supp. 1396 (E.D.N.Y. 1985) (establishing plan for disbursement of settlement fund pending appeals), *aff'd in part, rev'd in part,* 818 F.2d 179 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.,* 611 F. Supp. 1452 (E.D.N.Y. 1985) (denying motion to set aside attorney fee-sharing arrangement), *rev'd in part,* 818 F.2d 216 (2d Cir.), *cert. denied,* 484 U.S. 926, 98 L. Ed. 2d 249, 108 S. Ct. 289 (1987); Ryan v. Dow Chemical Co., 618 F. Supp. 623 (E.D.N.Y. 1985) (approving settlement of class action and dismissing with prejudice claims of class members) (Special Masters for Settlement Kenneth R. Feinberg and David I. Shapiro); *In re "Agent Orange" Prod. Liab. Litig.,* 618 F. Supp. 625 (E.D.N.Y 1985) (approving plan for Australia and New Zealand); *In re "Agent Orange" Prod. Liab. Litig.,* 787 F.2d 822 (2d Cir. 1986) (dismissing claims of non-class plaintiffs against defendant not named in complaints); *In re "Agent Orange" Prod. Liab. Litig.,* 800 F.2d 14 (2d Cir. 1986) (denying motion to disqualify plaintiffs' attorneys from appealing settlement); *In re "Agent Orange" Prod. Liab. Litig.,* 804 F.2d 19 (2d Cir. 1986) (denying repeal of stay on settlement funds pending appeal); *In re "Agent Orange" Prod. Liab. Litig.,* 689 F. Supp. 1250 (E.D.N.Y. 1988) (modifying class assistance program as required by 818 F.2d 179 and granting opt-out plaintiffs opportunity to opt into class for purposes of benefitting from settlement fund). *See also* other Agent Orange cases: *Ryan v. Dow Chemical Co.,* 781 F. Supp. 934 (E.D.N.Y. 1992); *Ryan v. Dow Chemical Co.,* 1991 U.S. Dist. LEXIS 16532, 1991 WL 243311 (E.D.N.Y., Nov 12, 1991); *In re Agent Orange Fee Application of*

Yannacone, 139 F.R.D. 581 (E.D.N.Y.1991); *Ryan v. Dow Chemical Co.*, 781 F. Supp. 902, 1991 WL 200866, 60 U.S.L.W. 2284 (E.D.N.Y.1991). For further information, see *VA Home Page, Agent Orange and Vietnam Veterans, Agent Orange Helpline, e-mail GW/AO Helpline@vba.va.gov* (2003); Jeanne Mager Stellman, Steven D. Stellman, Tracy Weber, Carrie Tomasallo, Andrew B. Stellman and Richard Christian, Jr. A Geographic Information System for characterizing exposure to Agent Orange and other Herbicides in Vietnam, III Enviornmental Health Perspectives 321(2003); Institute of Medicine, Veterans and Agent Orange: Update 2002 (2002); Institute of Medicine, Veterans and Agent Orange: Update 2000 (2000); Leonard Rivkin & Jeffrey Silberfeld, From Auto Accidents to Agent Orange (2000); Nat'l Veterans Legal Services Program, Self-Help Guide on Agent Orange: Advice for Vietnam Veterans & their Families (2000); Institute of Medicine, Veterans and Agent Orange: Update 1998 (1998); Deborah E. Greenspan, Special Master, *In re "Agent Orange" Product Liability Litigation:* Final Report of the Special Master on the Distribution of the Agent Orange Settlement Fund (1997); Institute of Medicine, Veterans and Agent Orange: Update 1996 (1996); Individual Justice in Mass Tort Litigation (1995); The Legacy of Vietnam Veterans and their Families: Survivors of War: Catalysts for Change: Papers from the 1994 National Symposium (Dennis K. Rhoades ed., 1995); Institute of Medicine, Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam (1994); Michael Fumento, Science Under Siege: Balancing Technology and the Environment (1993); Ronald E. Gots, Toxic Risks: Science, Regulation, and Perception (1993); Peter H. Schuck, Fashioning a Settlement: Agent

Orange on Trial, *in* The Responsible Judge: Readings in Judicial Ethics (John T. Noonan & Kenneth I. Winston, eds., 1993); Michael E. Wildhaber, Veteran's Benefit Manual: An Advocate's Guide to Representing Veterans and their Dependents (1991); Kenneth R. Feinberg, Special Master, *In Re "Agent Orange" Product Liability Litigation:* Report of the Special Master Pertaining to the Disposition of the Settlement Fund (1989); Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (1986); Kenneth R. Feinberg, Special Master, *In Re "Agent Orange" Product Liability Litigation:* Report of the Special Maser Pertaining to the Disposition of the Settlement Fund (1985); *In Re "Agent Orange" Product Liability Litigation:* Preliminary Memorandum and Order on Settlement (1984); New York State Temporary Commission on Dioxin Exposure, Findings, Conclusions and Recommendations of the New York State Temporary Commission on Dioxin Exposure (1983); Carol Van Strum, A Bitter Fog: herbicides and human rights (1983); Fred Wilcox, Waiting for an Army to Die: The Tragedy of Agent Orange (1983); *Procedural History of the Agent Orange Products Liability Litigation,* 52 Brook. L. Rev: 335 (1986); Jeanne Mager Stellman, Steven D. Stellman, Richard Christian, Tracy Weber and Carrie Tomasallo, *The Extent and Patterns of Usage of Agent Orange and other Herbicides in Vietnam,* 422 Nature 681 (2003); Richard A. Nagareda, *Closure in Damage Class Settlements: The Godfather Guide to Opt-Out Rights,* 2003 U. Chi. L. Forum 141, 156; Joseph M. Guzzardo & Jennifer L. Monachino, *Gulf War Syndrome--Is Litigation the Answer?: Learning Lessons from In re Agent Orange,* 10 St. John's J. Leg. Comment. 673 (1995); Aaron D. Twerski, *With Liberty and Justice for All: An Essay on Agent Orange and*

Choice of Law, 52 Brook. L. Rev. 341 (1986); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. Chi. L. Rev. 337 (1986); Paula Batt Wilson, Note, *Attorney Investment in Class Action Litigation: The Agent Orange Example*, 45 Case W. Res. L. Rev. 291 (1994); Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigatin*, 86 Northwestern Univ. L. Rev. 643 (1992); Harvey P. Berman, *The Agent Orange Veteran Payment Program*, 53 L. & Contemp. Probs. 49 (1990); Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 Yale L.J. 813 (1989) (reviewing Peter Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Court (1987)); Charles Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontier of Knowledge*, 66 B.U. L. Rev. 521 (1986); Paul Sherman, *Agent Orange and the Problem of the Indeterminate Plaintiff*, 52 Brook. L. Rev. 369 (1986).

B. Agent Orange I

On February 19, 1979, the plaintiffs filed a 162-page complaint on behalf of named and unnamed Vietnam veterans and members of their families who claimed to have been injured as a result of their exposure to various phenoxy herbicides, including Agent Orange. *See Dowd v. Dow Chemical Company*, 79 CV 467 (E.D.N.Y. 1979). Plaintiffs alleged, among other things, that defendants negligently manufactured and sold to the government for use in Vietnam herbicides that contained 2,3,7,8 tetrachlorodibenzo-p-dioxin (TCDD or dioxin). Plaintiffs relied on theories of strict liability, breach of warranty, intentional tort and nuisance.

According to plaintiffs, the veterans' exposure to dioxin-contaminated herbicides in Vietnam resulted in a wide variety of systemic diseases including soft tissue sarcoma and porphyria cutanea tarda as well as miscarriages to veterans' wives and birth defects in their children.

Similar cases were pending in other jurisdictions. *See, e.g., United States v. Vertac Chemical Corp.*, 489 F. Supp. 870, 876 (E.D. Ark. 1980); *Green v. Dow Chem. Co.*, No. 79-651 (N.D. Ill. 1979); *Chapman v. Dow Chemical*, No. 79-652 (N.D. Ill. 1979); *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. 908, 914 (D. Or.1977); R. Bovey & A. Young, *The Science of 2,4,5-T and Associated Phenoxy Herbicides* 134 (1980). All cases were transferred to this district by the Judicial Panel on Multidistrict Litigation ("MDL Panel") for consolidation of pretrial proceedings. State cases were removed to the federal courts on various theories. Almost 600 cases originally filed in state and federal district courts throughout the country were transferred here for inclusion in this multidistrict litigation, MDL No. 381 (Agent Orange).

There were several actions involving claims by civilians. The civilian plaintiffs included: a proposed class of civilians allegedly exposed to phenoxy herbicides in Vietnam, *Thornton v. Dow*, C-81-005-JLQ (D. Wash. 1981); a proposed class of thirty-five thousand civilian residents of the County of Kaui, State of Hawaii, who alleged exposure to Agent Orange and other phenoxy herbicides during a testing program conducted in 1967, *Fraticelli v. Dow*, CV No. 82-0021 (D. Haw. 1982); civilian employees of defense contractors who were allegedly exposed to phenoxy

herbicides in Vietnam in 1967, *Kjome v. Dow*, CV 83C-3876 (N.D. Ill. 1983) and *Vaughan v. Dow*, CV No. 83-1440 (D. Ariz. 1983); a medical doctor who served in Vietnam, in the employ of the State Department, *Hogan v. Dow*, CV-R-81-410ECR (D. Nev. 1981); and a civilian employee of a contractor exposed to Agent Orange in 1975, *Lester v. Dow*, CV No. H-80-587 (S.D. Tex. 1980). These and similar actions filed by various civilian plaintiffs were also transferred to this district by the MDL Panel. Civilian cases were ultimately dismissed.

1. MDL Panel

Since 1968, section 1407 of title 28 of the United States Code has provided a means for the MDL panel's transfer of related cases pending in different federal district courts to a single district judge for pretrial proceedings. *See* 28 U.S.C § 1407. The savings in time and money when many cases are investigated and prepared together for disposition can be enormous.

Mass tort actions are especially suited to MDL treatment. *See, e.g., In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.D.L. 1992); *In re Air Crash Disaster at Boston, Massachusetts on July 31, 1973*,399 F. Supp. 1106 (D. Mass.1975); *In re "A.H. Robins Co., Inc., "Dalkon Shield" IUD Products Liab. Litig.*, 406 F. Supp. 540 (J.P.M.D.L.1975) (consolidation for pretrial proceedings of actions involving claims for damages arising out of use of intrauterine contraceptive devices); *In re Celotex Corp. "Technifoam" Products Liab. Litig.*, 68 F.R.D. 502 (J.P.M.D.L. 1975) (transfer of actions in which plaintiffs

claimed fire losses and structural damages as a result of defects in defendant's insulation material).

While a trial in this district of all the Agent Orange cases was once contemplated, the transferee count is not now authorized to try cases transferred from another district by the MDL panel on the basis of that transfer alone. *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 140 L. Ed. 2d 62, 118 S. Ct. 956 (1998); David F. Herr, *Annotated Manuel for Complex Litigation 3d* at 31.132 (2002). Many MDL cases are, however, still terminated in the transferee court by motion, settlement or on the basis of other forms of transfer.

The transferee court has broad powers in matters relating to management of the multidistrict case before it. Weigel, The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts, 78 F.R.D. 575, 584 (1978). Once a case has been transferred by the Panel, the transferee court assumes complete jurisdiction for pretrial purposes. It has authority to decide all pretrial motions including dispositive motions such as those for summary judgment or approval of a settlement. *Id.* at 582. The transferee court is also authorized to handle matters relating to class action certification to prevent inconsistent rulings and to promote judicial efficiency. *See In re Piper Aircraft Distribution System Antitrust Litigation*, 405 F. Supp. 1402, 1403-04 (J.P.M.D.L. 1975).

2. 1983 Class Certification

In 1983, this court certified a large class of Agent

Orange related plaintiffs under Federal Rules of Civil Procedure Rule 23(b)(3) for liability issues, and under Rule 23(b)(1)(B) for punitive damages. *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. at 718. Five factors were recognized as making the desirability of class certification even greater than it would be in most mass tort litigation. The first was size; plaintiffs' class in the litigation potentially numbered millions. If the claims were dealt with individually the result might have "result[ed] in a tedium of repetition lasting well into the next century." *In re No. Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 894 (N.D. Cal. 1981), *rev'd*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom. A. H. Robins Co. v. Abed*, 459 U.S. 1171, 103 S. Ct. 817, 74 L. Ed. 2d 1015 (1983). Second, was the need to assure that the financial burden would ultimately fall on the parties which should, as a matter of fairness, bear it. Third, certification would encourage settlement of the litigation; in a situation where there are potentially tens of thousands of plaintiffs, the defendants may naturally be reluctant to settle with individual claimants on a piecemeal basis. Fourth, a global settlement would permit a sharp reduction of transactional costs. Fifth, a reasoned, fair and economical scheme to administer the recovery settlement would permit swift and effective assistance to veterans and their families.

3. Class and Notice

In 1983, the court defined the class as:

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured

> while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2, 4, 5-trichlorophenoxyacetic acid or containing some amount of 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

In re "Agent Orange" Prod. Liab. Litig., 100 F.R.D. at 729.

Personal notice was mailed to several hundred thousand persons. The largest group represented names on file at the Veterans Administration Agent Orange Registry. A copy of the class order and notice was also sent to the governors of each of the states asking that the notice be referred to the appropriate state organizations dealing with Vietnam veterans. Cooperation was excellent. Many states gave wide circulation to the notice and others provided a list of names and addresses so the notice could be mailed to those veterans.

A court-approved announcement on nationwide television networks and on radio stations with a combined coverage of at least fifty percent of the listener audience in each of the top 100 radio markets was circulated. The text of that notice can be found in 100 F.R.D. at 734. The class notice was also published in three national general circulation newspapers and magazines and six veterans' magazines. Notice was directed to be sent to the ten largest circulation newspapers in Australia and the five largest circulation

newspapers in New Zealand. The text of the newspaper and magazine notice can be found at 100 F.R.D. at 734-35. Informal notice through the news media was widespread. Plaintiffs were authorized to arrange a toll-free telephone number. Callers were to be told where to write to obtain more information concerning the litigation. Those requesting a copy of the notice mailed to class members were sent one. A large number of people called the toll-free number.

4. Settlement

Plaintiffs were represented by highly skilled and aggressive attorneys. Defense counsel were also adroit. Negotiations on behalf of present and potential future plaintiffs was intense.

The parties entered into a settlement agreement. Defendants agreed to pay $ 180 million (the "Settlement Amount") in full and final settlement of all claims for compensatory damages against them, and their foreign and domestic predecessors, successors, parents, subsidiaries, affiliates and insurers, as well as any of their stockholders, directors, officers, employees and agents, that arose out of or were based on, or could have in the future arisen out of or have been based on, any of the matters alleged in the complaint. All amounts paid by defendants were placed into a fund (the "Fund") established, maintained and administered by this court. The Fund was under the Court's continuous jurisdiction, control and supervision to assure that it earned the maximum interest consistent with safety and that all disbursements were properly made. The sum, at the time, was unprecedented. *See, e.g.*, Ralph Blumenthal, *Veterans Accept $ 180 Million*

Pact on Agent Orange, N.Y. Times, May 8, 1984, at A1. Because of high interest rates and investment policies, the total Fund ultimately grew to some $ 330 million.

Claims against the Fund were the exclusive remedy of all Class members arising out of or relating to, or in the future arising out of or relating to, the subject matter of the Complaint. The settlement required the setting aside of $ 10 million of the $ 180 million to indemnify the defendants from any judgments obtained in state court actions by members of the class alleging harm caused by exposure to Agent Orange in or near Vietnam. Any part of the indemnity fund not used was to revert to the benefit of the class members. This $ 10 million was subsequently combined with the rest of the Fund with the consent of defendants.

The Class specifically included persons who had not yet manifested injury. All persons who were otherwise qualified but who had previously requested exclusion from the Class had the opportunity to withdraw their exclusion (opt back in) within a reasonable time as determined by the court. As administered, all those who opted out of the class in effect had the option of reentering the class at any time since any veteran or veteran's family was not asked what their position had been in the litigation when applying for help from the Fund.

5. Post Settlement

Following the settlement, the court held extensive hearings on fairness and adequacy in New York, Chicago, Houston, Atlanta and San Francisco. Some 500 witnesses were heard. The court considered hundreds

of additional written communications from veterans, members of their families, veterans' organizations, and others. In September of 1984 the court issued a preliminary memorandum and order approving the settlement as fair, reasonable and adequate. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (Preliminary Memorandum and Order on Settlement). After the further determinations required by that order were made -- the plan for distribution to eligible class members and the amount of reasonable attorneys' fee awards to plaintiffs' attorneys -- final approval of the settlement was granted. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985) (Memorandum, Order and Judgment on Distribution of the Settlement Fund), *aff'd in part, rev'd in part*, 818 F.2d 179 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985) (Memorandum and Order on Attorney Fees as Modified and Final Judgment), *aff'd in part, rev'd in part*, 818 F.2d 216 (2d Cir. 1987); 818 F.2d 226 (2d Cir. 1987), *cert. denied sub nom. Newton Schwartz v. Dean*, 484 U.S. 926, 108 S. Ct. 289, 98 L. Ed. 2d 249 (1987).

a. Dismissal of Opt-Out Claims

After the court preliminarily approved the Settlement Agreement, most of the original 2,500 opt-outs chose to come back into the class with the court's permission. Two hundred and eighty-two servicepersons did not. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. at 1230. Their claims were embodied in seventeen different cases.

Summary judgment was granted against each opt-out

plaintiff on the grounds, *inter alia*, that none could prove by the probability demanded in tort litigation that his or her ailment was caused by Agent Orange, *see* 611 F. Supp. at 1260-63; 611 F. Supp. at 1284-85, and that all the claims were barred by the military contractor defense. *See* 611 F. Supp. at 1263-64; 611 F. Supp. at 1285. As already noted, those dismissed plaintiffs were nonetheless permitted by the court to obtain full benefits from the Fund.

b. Appeals

Appeals were taken from numerous orders including the orders certifying the class action, approving the settlement, outlining the distribution plan, awarding counsel fees, granting summary judgment against the opt-out claimants, dismissing untimely claims, dismissing all the claims against the United States, and unsealing discovery materials.

In nine unanimous opinions dated April 21, 1987 a panel of the Second Circuit Court of Appeals disposed of all of the numerous individual appeals except those from the order of the district court providing for public access to documents sealed from public view during the discovery phase of the litigation. Following the denial of several petitions for rehearing and for rehearing *en banc*, six petitions for writs of certiorari were filed with the Supreme Court by the opt-out plaintiffs, by class members who objected to the settlement and distribution, by other plaintiffs whose claims were dismissed, and by one of the plaintiffs' attorneys who sought reversal of the appellate court's rulings on counsel fees. The petitions for writs of certiorari were all denied by the Supreme Court. *In re "Agent Orange"*

Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987) (affirming class certification and approving of settlement), *cert. denied sub nom. Pinkney v. Dow*, 484 U.S. 1004, 108 S. Ct. 695, 98 L. Ed. 2d 648 (1988), and *Lombardi v. Dow Chemical Co.*, 487 U.S. 1234, 108 S. Ct. 2898, 101 L. Ed. 2d 932 (1988); 818 F.2d 179 (2d Cir. 1987) (approving Payment Program but rejecting Class Assistance Foundation);818 F.2d 187 (2d Cir. 1987) (affirming summary judgment entered against opt-out plaintiffs on ground of government contractor defense), *cert. denied sub nom. Lombardi v. Dow*, 487 U.S. 1234, 108 S. Ct. 2898, 101 L. Ed. 2d 932 (1988); 818 F.2d 194 (2d Cir. 1987) (affirming dismissal of Federal Tort Claims Act claims of servicemen and their relatives against the United States, on the grounds that they are barred by the *Feres* doctrine and by the discretionary function exception to the Federal Tort Claims Act);818 F.2d 201 (2d Cir. 1987) (affirming dismissal of "direct" claims against United States brought by wives and children of servicemen, on *Feres* grounds), *cert. denied sub nom. Adams v. United States*, 484 U.S. 1004, 108 S. Ct. 695, 98 L. Ed. 2d 647 (1988); 818 F.2d 204 (2d Cir. 1987) (affirming dismissal of claims of "Agent Orange" manufacturers against United States for contribution and indemnity for the class action settlement payments); 818 F.2d 210 (2d Cir. 1987) (affirming dismissals of Hawaiian civilians' actions against the United States and the chemical companies), *cert. denied sub nom. Pinkney v. Dow Chemical Co.*, 484 U.S. 1004, 108 S. Ct. 695, 98 L. Ed. 2d 648 (1988); 818 F.2d 216 (2d Cir. 1987) (rejecting plaintiff class' attorneys' fee-sharing agreement and reinstating fee award determined by district court), *cert. denied sub nom. Schwartz v. Dean*, 484 U.S. 926, 108 S. Ct. 289, 98 L. Ed. 2d 249 (1987), 818 F.2d 226 (2d Cir. 1987) (approving

district court's calculations of attorneys' fee awards, with abrogated award reinstated), *cert. denied sub nom. Newton Schwartz v. Dean*, 484 U.S. 926, 108 S. Ct. 289, 98 L. Ed. 2d 249 (1987).

In an opinion dated June 10, 1987, a separate panel of the Court of Appeals for the Second Circuit affirmed the district court's order unsealing materials produced or generated during discovery in the Agent Orange litigation; defendants filed a petition for writ of certiorari with the Supreme Court, which was denied on November 17, 1987. *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 562 (E.D.N.Y. 1985) (Magistrate's Pretrial Order No. 33, dated December 17, 1984) ("Protective Orders Opinion"), *aff'd*, 821 F.2d 139 (2d Cir. 1987), *cert. denied sub nom. Dow v. Ryan*, 484 U.S. 953, 108 S. Ct. 344, 98 L. Ed. 2d 370 (1987).

6. Plan for Distribution

After additional formal hearings, the court adopted (with slight revision) a plan of distribution prepared by Special Master Kenneth R. Feinberg after consultation with the court; it took into account the suggestions from various veteran advisors. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985), *modified*, 818 F.2d 179 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234, 101 L. Ed. 2d 932, 108 S. Ct. 2898, *and modified*, 689 F. Supp. 1250 (1988). The plan specified two mechanisms for the distribution of the Fund to the class members residing in the United States.

First, it provided for distribution of cash payments to individual veterans based generally on the severity of the veteran's medical condition or death (along with

other factors). The objective of the cash payment program was to provide prompt financial benefits to those most in need.

Second, it leveraged Fund assets for the benefit of families of the veterans through the establishment of a grant-making "foundation." The foundation was to provide initial funding for organizations to provide services and benefits specifically targeted to the needs of the class, including, particularly, the children of the veterans. The hope was that through education and provision of directed funding the foundation (1) would create a lasting legacy for the Vietnam veteran community by institutionalizing a services support network directed at the needs of the population of Vietnam veterans and their families, and (2) establish a basis for the government's recognizing the possible impact of Agent Orange on children and families of the veterans. Both these hopes have been substantially realized.

The United States Court of Appeals for the Second Circuit stayed implementation of the distribution plan pending the resolution of appeals. Finally, on April 21, 1987, this court's decisions certifying the class, finding the settlement to be fair, reasonable and adequate, and adopting the distribution plan (with modification) were affirmed. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir. 1987) (grant-making to be directly controlled by the court).

7. Distribution of the Settlement Fund

As of June 30, 1997 the Fund had all been distributed or

committed for the benefit of the class of plaintiffs in accordance with the plan of distribution approved by the court. The Final Report on the distribution of the Fund was issued in September of 1997.

During the course of the nine-year distribution of approximately $ 330,000,000, the Fund provided $ 267,901,842.66 (consisting of $ 196,595,084.66 through the Agent Orange Veteran Payment Program and $ 71,306,758 through the Agent Orange Class Assistance Program) to and for the benefit of some 291,000 class members associated with the United States armed forces in the form of either direct cash payments or provision of services. An additional $ 692,834.70 was distributed by the New Zealand Agent Orange Trust to and for the benefit of class members in New Zealand, and $ 7,086,684 was distributed by the Australian Vietnam War Veterans Trust to and for the benefit of Vietnam veterans in Australia. A total of $ 2.7 million was being distributed to veterans or for their benefit when the program ended. The remainder was used to pay attorney's fees and transactional expenses. *See* Final Report at 3.

C. Agent Orange II

In 1989 and 1990, two overlapping class actions, *Ivy v. Diamond Shamrock Chemicals Co.* and *Hartman v. Diamond Shamrock Chemicals Co.*, were brought in Texas courts. *See Ryan v. Dow Chemical*, 781 F. Supp. 902 (E.D.N.Y. 1991). The two actions described in *Ryan* were, in effect, direct challenges to the validity of the settlement and the programs financed by the Fund. Those plaintiffs, who were class members, sued the same chemical companies who were defendants in the

original Agent Orange litigation on the same grounds and for the same relief as was originally sought and compromised in the class action. If plaintiffs were successful, they would have automatically reduced the sums available for other class members, since the terms of the settlement set aside $ 10 million for indemnification of the defendants against suits of that kind.

The cases presented the question of whether members of a class whose action was brought and was still pending in federal court could circumvent the effect of a federal judgment by bringing new actions in a state court relying exclusively on state law. The need to protect other class members, the importance of maintaining the class action as viable litigation device, and the interest of all litigants in the finality of settlements required that the question be answered in the negative.

At the heart of these lawsuits was plaintiffs' belief that it was unfair to bind them to the settlement because the latency of their injuries prevented them from knowing definitively whether or not they were included in the class at the time of the first deadline for opting out of the Agent Orange class action. This court held that they were in fact bound. *In re "Agent Orange" Prod. Liab. Litig.*, 618 F. Supp. at 625, *aff'd*, 818 F.2d 145 (2d Cir.1987), *cert. denied*, 484 U.S. 1004, 108 S. Ct. 695, 98 L. Ed. 2d 647. *See also, Kane v. Johns- Manville Corp.*, 843 F.2d 636, 638-639 (2d Cir. 1988) (affirming reorganization plan that binds future claimants with no present injuries). Nevertheless, plaintiffs' argument raised significant considerations of justice.

All of the courts which considered the Agent Orange Settlement were fully cognizant of the conflict arguments hypothesized by the plaintiffs in this second wave of complaints. They took steps to minimize the problem in the way they arranged for long-term administration of the Settlement Fund. In many cases the conflict between the interests of present and future claimants was insignificant. Those plaintiffs, like all class members who suffered death or disability before the end of 1994, were eligible for compensation from the Settlement Fund. The relevant latency periods and the age of the veterans ensured that almost all valid claims would be revealed before that time. As veterans become older and diseases of their peer non-veteran group are more and more common, it is less and less likely that a connection of the disease for a particular veteran to Agent Orange can be proved to any substantial degree of probability through epidemiological or other scientific techniques. In addition, the generous government V.A. programs for allowing Agent Orange disabilities on the most tenuous statistical bases for many diseases ensures that those who learn of their disease long after service in Vietnam will be compensated by disability and other payments for their lifetime as service-connected disabled persons. This government program was adopted after the Agent Orange private Fund was established. Accepting benefits from either the private Fund or the V.A. program did not disqualify a claimant from the other remedy.

This court ultimately held that, except for overseeing the expenditure of the Settlement Fund to ensure that it did the greatest possible good for the veterans and their families, the court could do nothing more for

plaintiffs in the second wave of complaints. The Court of Appeals for the Second Circuit upheld the decision, stating that "victims with no visible symptoms, were included in the plaintiff class." *In re "Agent Orange" Prod. Liab. Lit.*, 996 F.2d 1425, 1434 (2d Cir. 1993).

The Court of Appeals' 1993 opinion was believed to have effectively closed the door to claims against manufacturer's of Agent Orange. From 1993 to the commencement of the instant litigation, the spigot of litigation that had gushed since the early 1980s slowed considerably. For published opinions dating from 1993, see, for example, *Miller v. Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001) (civilian workers' claims were barred by the military contractor defense); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998) (holding that removal was proper under Federal Officer Removal Statute and that claims were barred by statute of limitations); *In re "Agent Orange" Prod. Liab. Lit.*, 1999 WL 1045197 (E.D.N.Y. 1999) (barred by statute of limitations).

D. Agent Orange III, the Instant Litigation

Plaintiffs in a third wave of litigation now contend that their diseases became known to them after the Settlement Fund was expended.

1. District Court

In August of 1998, the Isaacsons began this latest group of Agent Orange cases with the filing of a suit in New Jersey state court, asserting only state law claims. Defendants removed the case to federal court. Isaacsons' motion to remand was denied by the District

Court in New Jersey. Thereafter, the case was transferred to this court by the MDL Panel.

The Stephensons filed their suit pro se in the United States District Court for the Western District of Louisiana in February of 1999. Soon thereafter they obtained counsel. Defendants were granted an order by the MDL Panel, transferring the case to this court. The Isaacson and Stephenson cases were consolidated by this court.

Defendants moved in this court to dismiss the complaints under Rule 12(b)(6) of the Federal Rules of Civil Procedure. They argued that plaintiffs' claims were barred by the 1984 class settlement and subsequent final judgment. The motion was granted. This court concluded that the suit was an impermissible collateral attack on the prior settlement.

A number of other similar cases are now pending in this court. *See Schuckman v. Dow Chemical Co.*, No. 03-02120 (E.D.N.Y. filed May 2, 2003); *Skinner v. Dow Chemical Co.*, No. 03-02935 (E.D.N.Y. filed June 9, 2003); *Kidd v. Dow Chemical Co.*, No. 03-05047 (E.D.N.Y. filed Oct. 2, 2003); *Anderson v. Dow Chemical Co.*, No. 03-05227 (E.D.N.Y. filed Oct. 17, 2003); *Gallagher v. Dow Chemical Co.*, No. 03-05875 (E.D.N.Y. filed Nov. 11, 2003); *Stearns v. Dow Chemical Co.*, No. 03-05965 (E.D.N.Y. filed Nov. 7, 2003); *Breaux v. Dow Chemical Co.*, No. 03-05966 (E.D.N.Y. filed Nov. 7, 2003); *Breaux v. Dow Chemical Co.*, No. 03-05967 (E.D.N.Y. filed Nov. 25, 2003); *Gallagher v. Dow Chemical Co.*, No. 03-05970 (E.D.N.Y. filed Nov. 25, 2003). Calls to the Clerk's office

indicate that hundreds of additional such cases can be expected to be filed shortly.

2. Appeals

The Second Circuit Court of Appeals reversed this court's holding that the instant suits constituted an impermissible collateral attack on the settlement, but it upheld the District Court's jurisdiction over Isaacson under the All Writs Act. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2nd Cir. 2001), *aff'd in part, vacated in part by Dow Chemical Co. v. Stephenson*, 539 U.S. 111, 123 S. Ct. 2161, 156 L. Ed. 2d 106 (2003).

The Court of Appeals held that plaintiffs' suits could proceed because there had been no "prior adequacy of representation determination with respect to individuals whose claims [arose] after the depletion of the settlement fund." *Id.* at 258. Both Stephenson and Isaacson fell within the class defined in the 1984 settlement, but their alleged injuries allegedly did not manifest themselves until after the Settlement Fund been expended. The Court of Appeals found that there was an apparent conflict between plaintiffs and the class representatives because the litigation addressed all future claimants, but only provided recovery for those whose injuries were discovered prior to 1994. It believed that under *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 144 L. Ed. 2d 715, 119 S. Ct. 2295 (1999), plaintiffs were not adequately represented in the prior litigation and could not be bound by the 1984 class settlement without violating their rights to due process.

On appeal to the Supreme Court of the United States, an equally divided court affirmed the Court of Appeals decision as to the collateral attack on the prior settlement. *Dow Chemical v. Stephenson*, 539 U.S. 111, 123 S. Ct. 2161, 156 L. Ed. 2d 106 (2003) (per curiam). It vacated the decision with respect to jurisdiction under the All Writs Act. *Id.*

The Court of Appeals for the Second Circuit remanded the cases for further proceedings consistent with its 2001 opinion and the decision of the Supreme Court. *Stephenson v. Dow Chemical Co.*, 346 F.3d 19 (2d Cir. 2003). This court now addresses the merits of plaintiffs' claims on defendants' motion for summary judgment. Other aspects of these cases raising jurisdictional and amendment issues will be treated in separate memoranda.

III. Facts as to Government Contractor Defense

The facts supporting the government contractor defense are the same for each of the defendants. They are set forth in the extensive contractual and other documents consisting of many hundreds of pages supporting each defendant's motion. The statements below are based primarily on the affidavit and documents submitted on behalf of Diamond Shamrock Corporation (Diamond) which parallel those submitted on behalf of other defendants, and the affidavit and documents submitted on behalf of all defendants.

A. Orders from Government

From 1951 until July 1969, Diamond manufactured at Newark, among other materials, the phenoxy

herbicides 2,4-dichlorophenoxyacetic acid ("2,4-D") and 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T"). Diamond also manufactured at Newark trichlorophenol ("TCP"), the intermediate used to produce 2,4,5-T. It prepared the TCP in a heated autoclave using the starting ingredient 1,2,4,5-tetrachlorobenzene ("TCB").

Commencing in 1961 and continuing through 1968, Diamond produced and delivered Agent Orange to the United States pursuant to contracts entered into with the Defense General Supply Center, the Defense Fuel Supply Center, the United States Army or the United States. Air Force. The Contracts set forth or incorporated by reference detailed specifications for the Agent Orange to be supplied to the Government and the 2,4-D and 2,4,5,-T the product contained. Those specifications were promulgated by the Government. Diamond fully complied with them. In addition, Diamond conducted all inspections and tests on Agent Orange, 2,4,-D and 2,4,5-T that were required pursuant to those specifications. Compliance with the government's specifications were certified by government inspectors in Material Inspection and Receiving Reports.

The contracts contained, or were treated as if they contained, a "DO-C9e" rating assigned to it by the United States pursuant to the Defense Production Act of 1950, as amended, 50 U.S.C. App. § 2061 et. seq., and the regulations promulgated under the Act. The ratings required delivery to help prosecute the military actions of this country in Vietnam and provided the means to obtain scarce materials and equipment to produce Agent Orange.

By September 1966, the United States had determined that the Air Force's requirements for Agent Orange exceeded total domestic production capacity, and that available quantities were insufficient to meet the Air Force's remaining requirements for fiscal year 1967. The United States' procurement of Agent Orange was by this time on an "emergency basis."

The problem of insufficient production capacity was exacerbated by a shortage of TCB, the starting ingredient needed for the production of TCP. Diamond relied on Hooker Chemical Corporation for its TCB supplies. By September 1966, Diamond was unable to produce at full capacity because of the TCB shortage. In November 1966, the Department of Commerce advised Diamond that the United States would require "the maximum capacity of Diamond's production of 2,4,5-T acid."

In December 1966, the Military Assistance Command, Vietnam ("MACV") advised the Commander-In-Chief, Pacific ("CINCPAC") that the United States' projected shortage of Agent Orange was of immediate operational concern to MACV, that the value of herbicide operations in Vietnam had been proven, and that a failure to obtain needed supplies would cause an unacceptable impact on military operations. MACV accordingly requested that the United States investigate the possibility of plant expansion or diversion of product from commercial uses to bolster supplies.

In connection with the United States' consideration of whether to build its own facility for the production of Agent Orange, representatives of Edgewood Arsenal

inspected Diamond's production operations at Newark in December 1966. The Director of the Office of Emergency Planning of the Executive Office of the President notified Secretary of Defense Robert McNamara on March 10, 1967 that "the Administrator, Business and Defense Services Administration is currently instituting procedures to insure that the entire output of the chemical 2,4,5-T, which is the limiting component in the production of 'Orange,' will be used on military orders."

On March 24, 1967, the Department of Commerce's Business and Defense Services Administration ("BDSA") directed Diamond, pursuant to Section 101 of the Defense Production Act of 1950, to accelerate delivery of its existing DO-rated orders for Agent Orange to a monthly rate of 30,600 gallons beginning April 3, 1067, and to a rate of 51,100 gallons once a projected expansion of the Newark Plant was completed in the Fall of 1967. The monthly delivery rates set forth in this directive (the "Directive") represented 100% of the Newark Plant's production capacity for 2,4,5-T, the limiting component in the manufacture of Agent Orange.

The Directive also required Diamond to provide BDSA with a monthly report of production, total shipments, shipments against rated orders, and end of month inventory of 2,4,5,-T and 2,4-D. In addition, the Directive stated that:

> Your requirements for tetrachlorobenzene may be obtained by placing DO rated orders on your supplier. We have informed the Hooker Chemical Corporation of your need for 150,000

> pounds per month beginning April 3, 196[illegible], with the understanding that these shipments will be at the rate of approximately 100,000 pounds each twenty days due to the capacity of the facilities used to transport material to your plant. *** If you encounter any difficulty in obtaining your needs of raw materials, please let me know immediately.

The United States also mandated that Hooker Chemical supply the crucial starting ingredient, TCB, only to companies producing Agent Orange. Diamond was able to obtain TCB only because it was using the TCB exclusively for the production of Agent Orange. Thus, even assuming arguendo that Diamond had the opportunity under the Defense Production Act to refuse to accept the Directive, as a practical matter such an opportunity would have been meaningless: Diamond would have been forced to close its Plant because the United States controlled all access to the starting ingredient needed for production of any 2,4,5-T.

The United States, simultaneous with its Directive requiring Diamond to accelerate delivery of Agent Orange, acted to increase Diamond's Agent Orange production capacity. In February 1967, the Department of Commerce provided Diamond a "DO-D4" priority rating to obtain equipment and material needed for the Newark Plant expansion. All purchase orders for this project contain the statement that "the material on this order carries a rating of DO-D4 certified for National Defense Use under BDSA-Regulation 2, Case 30440." Representatives of the Defense General Supply Center

actively interceded on behalf of Diamond to assist in obtaining equipment needed for the Plant expansion.

In April 1967, the Department of Commerce telephoned the Operations Manager of Diamond's Agricultural Chemicals Division, to relay "serious concern about the delay in starting up the converted D facilities to produce T Acid." In May 1967, the BDSA assured Diamond that it would assist in obtaining any 2,4-D needed by Diamond while awaiting installation of its new 2,4-D equipment. The BDSA also directed that if Diamond completed its Plant expansion earlier than anticipated, and therefore achieved higher rates of 2,4,5-T production, all of it must be formulated into 'Orange' and shipped to the Department of Defense pursuant to Section 101 of the Defense Production Act." In May 1967, the United States directed that Diamond treat as "classified" all information concerning Agent Orange production.

Effectively the United States commandeered the Newark Plant pursuant to the Defense Production Act for use in the national defense effort. The government mandated that the Newark Plant produce 2,4,5-T exclusively for use in the production of Agent Orange, prohibited the sale of 2,4,5-T to private customers, closely monitored production activity, required Diamond to account for production and inventory levels, controlled access to the crucial starting ingredient, TCB, permitted TCB deliveries only for use in making Agent Orange, ordered Diamond to accelerate deliveries of Agent Orange, and acted to increase the Newark Plant's production capacity by helping to obtain, and assigning a priority rating to, material and equipment needed for the Plant

expansion. It closely supervised production and tested the Agent Orange delivered to ensure that it complied with specifications.

Plaintiffs complain that some of the many contracts are missing or illegible. This is to be expected in this by now ancient case. It does not matter since the contracts and other documents are repetitive and redundant. The product of each of the manufacturers was mixed and expended in a way that makes it impossible to now determine whose Agent Orange actually touched which plaintiff when, if at all. Plaints of plaintiffs' counsel that it is difficult to obtain old documents concerning Agent Orange from the National Archives are not compelling; all the evidence relevant to this motion has been available from the beginning from this court's files which could have been recalled from storage for ease in research by the parties and courts. No new data would change the facts critical to the contractor's defense.

B. Awareness by Government of Dangers

The herbicidal properties of 2,4-D and 2,4,5-T as a munition were discovered in research conducted by the United States military during World War II. During the 1950s and 1960s, the United States armed forces developed these compounds as weapons of war, conducting extensive testing and experimentation involving applications of high concentrations of these materials at heavy rates to defoliate large areas indiscriminately as rapidly as possible.

By 1949, the United States Public Health Service ("PHS") investigated cases of the skin condition

chloracne possibly caused by dioxin at Monsanto's 2, 4, 5-T plant in Nitro, West Virginia. During the 1950s and 1960s the PHS developed considerable expertise on dioxin's toxicity; chloracne developed by persons exposed to high levels of dioxin; and dioxin's potential presence as an unintended by-product in the production 2,4,5-T. (Caley Aff. Ex. 18 at 35-39.)

In the early 1950s, scientists at the Army Chemical Corps Chemical Warfare Laboratories located at Edgewood Arsenal, Maryland ("Edgewood") had learned of a toxic by-product in the manufacture of 2,4,5-T. By 1959, many Edgewood scientists knew that dioxin was that toxin and was associated with chloracne. (Gordon Supp. Aff., Ex 7.)

Early in the 1960s, Edgewood personnel, on orders from the White House, investigated the toxicity and potential dangers of 2,4,5-T and 2,4-D, thoroughly reviewing the existing literature and data. (Caley Aff., Ex. 18 at 18-19.) The military scientists at the Chemical Warfare Laboratories at Edgewood Arsenal were evaluating 2,3,7,8-tetrachlorodibenzo-*p*-dioxin ("TCDD"or "dioxin") as a potential chemical warfare agent. They had learned in 1957 of an outbreak of chloracne in a German chemical plant manufacturing 2,4,5-tricholorophenol, the principal raw material used in the manufacture of 2,4,5-T, and had reviewed an article published by Kimmig and Schultz identifying small quantities of dioxin as the cause of the occupational injury to the workers. (Caley Aff., Ex 18 at 8-9.)

During the early 1960s, the United States conducted experiments with many herbicides, including 2,4,5-T

and 2,4-D, to devise formulae specifically for military use in Southeast Asia. Based on these experiments, the United States developed several phenoxy herbicides, including "Agent Orange" (approximately 50% the n-butyl ester of 2,4-D and 50% the n-butyl ester of 2,4,5-T), "Agent Pink" (approximately 60% the n-butyl ester of 2,4,5-T and 40% the iso-butyl ester of 2,4,5-T), and "Agent Purple" (approximately 50% the n-butyl ester of 2,4-D, 30% the n-butyl ester of 2,4,5-T, and 20% the iso-octyl ester of 2,4,5,-T). The United States' phenoxy herbicide specifications are collectively referred to as "Agent Orange" for purposes of this memorandum.

In the early 1960s, personnel at Edgewood, on orders from the White House, investigated the toxicity and potential dangers of 2,4,5-T and 2,4-D, thoroughly reviewing the existing literature and data. The President's Science Advisory Committee (PSAC), an organization within the White House, was briefed by the military on the Vietnam defoliation program and learned of dioxin as a contaminant in Agent Orange.

At the time it developed its specifications for Agent Orange, the United States knew that 2,3,7.8-tetrachlorodibenzo-p-dioxin ("dioxin") was at the time formed as a by-product during the manufacture of TCP, the intermediate used to produce 2,4,5-T, and that dioxin was also present in 2,4,5-T. It also knew that dioxin was believed to be toxic.

Throughout the time period that Diamond and the other defendants produced Agent Orange for the United States, the government knew that dioxin was being produced during the manufacture of TCP, that dioxin was also present in 2,4,5-T, that it was present in

Agent Orange as produced by Diamond and each of the other defendants, and that dioxin was toxic. The United States knew from its own experiments and decisions on whether to constructs own plants, or to use existing private sources, that production of Agent Orange invariably resulted in some dioxin being present in Agent Orange, and that there was a risk that dioxin was carcinogenic and might cause other diseases. Its knowledge and information was at all times greater than that of defendants.

In 1963, the Institute for Defense Analyses reported to the Department of Defense that herbicides such as 2,4-D and 2,4,5-T were safe when used commercially "in quite dilute solutions," but could be hazardous to health and to military operations because of their use in overkill concentrations by less experienced personnel under the pressure to act quickly in a military environment. Nevertheless, the government determined that "extremely high dose rates" of undiluted herbicides were required for effective military use. (Gordon Opp. Aff., Ex. 7 at ¶¶ 7-9; Reply Affidavit of Michael M. Gordon in Support of Motion for Reargument of Memorandum and Order of Remand (Jn. 29, 1992), Ex 19 at ¶ 7.)

The PSAC reviewed and approved the military plans for the Vietnam defoliation program in 1963. The presence of dioxin as a possible toxic contaminant in Agent Orange was discussed by various members of PSAC in 1963, 1965, and at other times. (Caley Aff., Ex. 18 at 28.) While one of the persons involved in those discussions was Dr. Melvin Calvin, a winner of the Nobel prize in chemistry, who at the time was a member of the Board of Directors of the Dow Chemical

Company, the government itself conducted its own toxicological tests before proceeding with an operational defoliation program in Vietnam. Dr. Bernard McNamara, one of the military scientists involved in the evaluation of dioxin at Edgewood Arsenal, conducted the military's toxicity testing to evaluate the safety of Agent Purple (with apparently somewhat the same dioxin content as Agent Orange) for use in Vietnam in 1963. (Caley Aff., Ex. 18 at 12-14.)

An analytical method of measuring dioxin levels directly in Agent Orange was not available until the early 1970s. In early part of the 1960s, a bioassay known as the rabbit ear test was available to detect the presence of low levels of chloracnegens of any kind in the process. In the middle part of the decade, the analytical method was improved so that it was capable of measuring dioxin content in trichlorophenol, the intermediate used to produce 2,4,5-T. Amounts of dioxin lower than 1 ppm, however, could not be detected using this analytical method. But, 2,4,5-T manufactured from trichlorophenol containing no detectable dioxin using this analytical method would be expected also to contain less than 1 ppm dioxin. Samples of Agent Orange produced by various manufacturers in the 1960s were analyzed in 1972 using a newly developed more sensitive analytical method. Samples of dioxin detected ranged from 0.05 ppm to 47 ppm. As time went on, the capability of measuring dioxin was increasingly refined so that almost infinitesimally small amounts could be detected--and are now discovered widely in the atmosphere. *See* U.S. Environmental Protection Agency, *Information Sheet 1, Dioxin: Summary of the Dioxin Reassessment Science*, May 25, 2001.

In connection with the government's 1967-68 contemplated project to build its own Agent Orange manufacturing plant at Weldon Springs, Missouri, the government considered and worked with information regarding cases of chloracne in the manufacture of 2,4,5-T, the toxicity of dioxin, dioxin's presence in Agent Orange, and the manufacturing process of Agent Orange. The government learned of factors in the manufacturing process which it believed affected the amount of dioxin created in the manufacturing process and included a section titled "DIOXIN" in the draft manual for operations of the government plant. (Caley Aff., Ex 18 at 45-46.) The government believed that it could develop a new technology that would reduce, control or prevent the formation of dioxin. Its interest in controlling the formation of dioxin was chiefly related to steps needed to protect the health of plant employees and to limit explosions during the manufacturing process. The government's proposed Agent Orange plant was cancelled before it was due to begin production.

The government also was aware that in merchandising similar herbicides the manufacturers typically produced a much diluted version and labeled the product with warnings as to exposure. Nevertheless, the manufacturers were ordered to deliver the product at full strength in barrels essentially unmarked except for the orange stripe on each barrel. The government neither informed the defendants of the way it would use their product or of any precautions it would take in utilizing Agent Orange in the field. The manufacturers had no control over warnings, use or precautions.

Prior to 1965, the Air Force's Environmental Health

Laboratory, under the direction of Dr. Walter W. Melvin Jr., performed a series of evaluations of the effects of 2,4,5-T. Even before these studies, Dr. Melvin knew of an association between chloracne and the production of 2,4,5-T, and knew that dioxin was the chloracnegen produced in the manufacture of 2,4,5-T. In the summer of 1966, both the Office of the Army Surgeon General and the Navy's Bureau of Medicine and Surgery requested and received from the National Academy of Sciences toxicity information on 2,4,5-T. In connection with the government's proposed project to establish its own Agent Orange production facility at Weldon Springs, Missouri, the government carefully considered all available information regarding cases of chloracne in the manufacture of 2,4,5-T, the toxicity of dioxin and dioxin's presence in Agent Orange as produced by defendants.

A government-sponsored study by the Bionetics Research Laboratories, that was begun in 1963 and completed in 1968, first suggested an association between exposure to large doses of 2,4,5-T and possible teratogenic effects in laboratory animals. It was as a result of this government study, and other information available only to the government, that a temporary ban on the use of Agent Orange in Vietnam was announced by the government in April 1970. That ban was made permanent in December 1970.

Knowledge possessed by the government -- albeit somewhat speculative as to the actual hazard, if any, posed by Agent Orange as it was used in Vietnam - was far greater than that possessed by defendants. There was never a period when defendants possessed as much knowledge as the government of the dioxin content of

Agent Orange and of its dangers as it was used in Vietnam.

C. Designation by Government of Specifications

Formal military specifications and purchase descriptions for 2,4,5-T and 2,4-D and Agent Orange were prepared and promulgated by the government. The government also strictly and precisely defined the markings that were to be placed on drums of Agent Orange supplied by defendants, prohibiting the placement of warnings on the drums by any defendant. The government did not specify the details of the manufacturing process to be utilized by defendants; it was, however, fully aware of the process that would be used, including the resulting dioxin elements.

Having all this superior knowledge of dangers, the government compelled defendants to supply Agent Orange meeting government specifications until late 1969 through government directives, pursuant to Section 101 of the Defense production Act of 1950. It commandeered United States industry's entire capacity to manufacture 2,4,5-T, ordering defendants to accelerate the delivery of Agent Orange. It specified the contents, packaging and method of delivery of the Agent Orange it compelled defendants to produce for the war effort. It required that there be no warnings on the Agent Orange containers delivered by defendants.

The government insisted on defendants' essentially abandoning their private commercial production and sale of a variety of diluted types of herbicides for the undiluted one developed and ordered by the government. The specifications were the government's,

not defendants. The United States armed forces accepted the dangers it was aware of because, from a military point of view, the benefits in potential savings of the lives of members of our armed forces and those of our allies outweighed the possible risks. Only late in the hostilities was information available to the government, but not the defendants, together with geopolitical considerations, powerful enough to lead to termination of the Agent Orange program.

Warnings of contents or possible toxicity were not permitted by the government. *See, e.g.*, attached to affidavit of Michael M. Gordon: DA 30-070-CM1,-1635, NY 2-6 ("Marking; a pale pink band, 3 inches wide, shall be painted around the center of the drums. There shall be no other identification as to contents or manufacturing origin, with the exception of lot number identification."); DS 00004105 ("Marking Specifications"); DS 00004098 (elements of product); DS 00002573 (specifications); DS 00002576 (color of drum and orange stripe); DS 00002579 (inspections by government): DS 00002710 (markings, orange band). *See also Fenner Tr at 54-55* (manufacturers prohibited from placing any warnings on drums). The method of use in Vietnam was classified. *See DS 00016965.* See also the Affidavit of William A. Krohley at 5- 46 with extensive reference to documents, transcripts and other discovery material.

Federal officers acting pursuant to their authority under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 135-135k ("FIFRA"), directed defendants to supply Agent Orange without the warnings and directions which would have been used for any of defendants' commercial herbicides for

civilian use. Federal officers did not register Agent Orange under FIFRA and did not comply with FIFRA requirements for warnings, relying on a statutory exception for "public officials while engaged in the performance of their official duties." 7 U.S.C. § 135e(a)(3). This exception extended to defendants as "person[s] acting for" such public officials pursuant to 7 U.S.C. § 135f(d). (Gordon Supp. Aff., Ex. 7 at ¶¶ 3-5.)

As pointed out above, defendants' Agent Orange contracts precisely specified the markings defendants were to place on the drums of herbicide. *See* Brock Aff., Ex. 11; McCarville Aff., Ex 14; Gordon Aff., Ex.12; Krohley Aff., Ex. 13; and Caley Aff., Ex 18. Federal officials prohibited defendants from any additional markings, warnings, instructions for use, or even identification of the contents of the drums, apparently for "security reasons." BDSA Division of Chemical and Allied Products worksheet for Request for Priorities Assistance (Mar. 27, 1967), Ex. 20 at ¶ 11 (report by BDSA analyst Jane Lewis requesting that Thompson Chemical Co. be directed to accelerate delivery of Agent Orange to the Department of Defense); Letter from W. J. Zepp at the BDSA to the Dow Government Marketing Manager (Sept. 17, 1968), Ex 21 at ¶¶ 3-5 (relieving Dow from the directive accelerated production and delivery of Agent Orange to the Department of Defense). As this court stated: "It is clear from the records that the highest officials in the United States were aware of the dangers and decided not to mark." Transcript before the court (E.D.N.Y. Feb. 26, 1992), Ex. 22; *see In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. at 818 (defendants' Agent Orange contracts "called for no warning on the drums about precautions and dangers"); In re "Agent Orange"

Prod. Liab. Litig., 996 F.2d 1425, 1436 (2d Cir. 1993) ("The Government strictly prescribed the markings on Agent Orange Barrels, and prohibited all extraneous label information, including warnings."), *cert. denied, Ivy v. Diamond Shamrock Chemicals Co.*, 510 U.S. 1140, 127 L. Ed. 2d 434, 114 S. Ct. 1125, 114 S. Ct. 1126 (1994). In addition to being prohibited from warnings, "the defendants had no control over how the government used the product after it was delivered." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. at 818.

Having all the above knowledge regarding dioxin and Agent Orange, the government made a "fully-informed" decision that the clear benefits of Agent Orange produced according to its specifications, control and inspections outweighed any risks. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 194. The government believed that Agent Orange was an "effective weapon" in a "unique battlefield environment." Transcript of Deposition of Army General W. C. Westmoreland, Ex. 23 at 31-32. The government continued to order defendants to supply Agent Orange until late 1969. As one high-level official testified, "we were overwhelmingly convinced we were doing the right thing to save lives." Transcript of Deposition of Dr. Foster, Ex. 24 at 23-25.

IV. Law

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," and identifying which materials "it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The burden then shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. E.2d 202 (1986); *see also* Fed. R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting the fraud shall be stated with particularity.").

HN3 All inferences are to be drawn from the underlying facts in the light must favorable to the party opposing the summary judgment motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). HN4 The mere existence of some peripheral factual disputes will not defeat an otherwise properly supported motion for summary judgment. *Anderson*, 477 U.S. at 247. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

B. Government Contractor Defense

Defendants argue that plaintiffs' claims are barred by the government contractor defense as developed by the Supreme Court of the United States. In *Boyle v. United Technologies Corp.*, [HN5] the Court set forth what is known as the government contractor defense:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

487 U.S. 500, 512, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988). "The military contractor's defense is premised on federal displacement of state law where state law significantly conflicts with the federal interest embodied in the federal government's sovereign immunity for discretionary functions." *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 839 (2d Cir. 1992). "Striped of its essentials, the military contractor's defense under *Boyle* is to claim, 'The Government made me do it.'" *In re Joint Eastern and Southern Dist. New York Asbestos Litigation (Grispo v. Eagle-Picher Industries, Inc.)*, 897 F.2d 626, 632 (2d Cir. 1990).

The federal common law government contractor defense is warranted by the uniquely federal interest in government procurement and a "significant conflict" between federal policy and state tort law. *Boyle*, 487 U.S. at 507. The Supreme Court found a basis for the

defense in the Federal Torts Claim Act's (FTCA) exemption for the performance of discretionary government functions. *Id.* at 511; 28 U.S.C. § 2680(a). It stated that the "selection of appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning" of Section 2680(a). *Boyle*, 487 U.S. at 511. Suits against military contractors under state tort law would have the same effect that the FTCA exemption sought to avoid.

Even prior to the Supreme Court's ruling in *Boyle*, the theory of a generic military contractor defense was applicable to the Agent Orange litigation. This court cited an early incarnation of the government contractor defense in dismissing claims by veterans and members of their families who had opted out of the 1984 class action settlement. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1263 (E.D.N.Y. 1985) (noting that at the time the defense had been "criticized," but remained "the law of the case"); *see also In re "Agent Orange" Prod. Liab. Litig.*, 534 F. Supp. 1046 (E.D.N.Y. 1982). The Court of Appeals for the Second Circuit affirmed dismissal based on the government contractor defense, stating that under certain circumstances "federal law shields a contractor from liability for injuries caused by products ordered by the government for a distinctly military use." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187, 190 (2d Cir. 1987); *see also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 173 (2d Cir. 1987) (describing military contractor defense as an "impossible, hurdle to surmount" for the plaintiffs). More recently, the Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of an Agent Orange suit based on the government contractor

defense. *Miller v. Diamond Shamrock*, 275 F.3d 414 (5th Cir. 2001).

To assert the government contractor defense, defendants must prove each of three elements:

1. Reasonably Precise Specifications

The "reasonably precise specifications" must be "imposed" by the government, a situation in which the government officials are the "agents of decision." *Grispo*, 897 F.2d at 630. *Boyle* is largely silent on what government actions constitute ordering "reasonably precise specifications." A court deciding whether the government has ordered such specifications will look to whether the government had the responsibility for drafting and approving the specifications of the product and had sole discretion in their modification. *Zinck v. ITT Corp.*, 690 F. Supp. 1331, 1336 (S.D.N.Y. 1988).

In *Lewis v. Babcock Industries, Inc.*, the plaintiff sustained injuries when the ejection mechanism in an Air Force fighter jet malfunctioned. 985 F.2d 83, 85 (2d Cir. 1993). The Second Circuit Court of Appeals found that the government had examined and approved components of the product. The government ordered a specific cable device, even though it knew the cable was susceptible to corrosion. The court held that when the government asked for a specific product, it had approved reasonably precise specifications. *Id.* at 89.

In *Zinck*, the government began a program to develop night vision goggles ten years before the contractor's involvement. The government initiated the design and controlled all phases of the program. *Zinck*, 690 F.

Supp. at 1336. This constituted reasonably precise specifications. *See also Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67 (3d Cir. 1990) (holding that government participation in design of ball bearing constituted more than rubber stamp); *Ramey v. Martin-Baker Aircraft* Co., 874 F.2d 946 (4th Cir. 1989) (Navy issued the original design specifications, inspected and tested product components, and examined model of product); *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698 (4th Cir. 1989) (contractor's design was approved by Navy and extensive discussions were held between contractor and Navy); *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989) (Army reviewed and approved drawings and specifications prepared by the contractor and government supplied relevant environmental specifications it wanted product to meet); *Stout v. Borg-Warner Corp.*, 933 F2d 331 (5th Cir. 1991) (even though design specifications were silent on the issue of whether contractor could add a protective device, government thoroughly reviewed design); *Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431 (5th Cir. 2000) (government was extensively involved in approval process); *Tate v. Boeing Helicopters*, 55 F.3d 1150 (6th Cir. 1995) (first prong is satisfied if parties engage in "continuous back and forth" review process); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992 (7th Cir. 1996) (the fact that contractor may have retained some discretion within government specifications does not defeat the defense when government has substantially reviewed or evaluated the design); *Butler v. Ingalls Shipbuilding*, 89 F.3d 582 (9th Cir. 1996) (Navy involved in design of the product, including testing and installation); *Wisner v. Unisys Corp.*, 917 F. Supp. 1501, 1510 (D. Kan. 1996) (government designed product with

virtually microscopic precision"); *In re Aircraft Crash Lit., Frederick, Md.*, 752 F. Supp. 1326 (S.D. Ohio 1990) (detailed specifications were result of constant interaction and negotiations); *Russek v. Unisys Corp.*, 921 F. Supp. 1277, 1288 (D.N.J. 1996) (government oversaw and participated in the design process and ultimately approved design in question with "continuous back and forth" review process); *Miller v. United Technologies Corp.*, 233 Conn. 732, 660 A.2d 810 (1995) (defense not defeated by the fact that the government was considering improvement to the design of the product, or that the government also approved an alternative design of the product); *Allison v. Merck & Co., Inc.*, 110 Nev. 762, 878 P.2d 948 (1994) (first prong shows more than mere government approval).

Satisfaction of the first prong of the government contractor defense requires involvement on the part of the government in the design process. Evidence of this involvement may consist of its own experiments and tests of a predecessor product it is developing or cooperative procurement work with the suppliers. If the defense is to be viable, the government cannot surrender to the contractor complete discretion as to the minutiae of the specifications; active participation is required. *See, e.g., Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989) (first prong not satisfied when Navy set only general performance standards for product and left the design to the complete discretion of the contractor); *Snell v. Bell Helicopter Textron*, 107 F.3d 744 (9th Cir. 1997) (record showed no discussion between government and contractor about the design of a critical feature of the product); *Johnson v. Grumman Corp.*, 806 F. Supp. 212 (W.D. Wis. 1992) (if

government delegates design discretion to the contractor, first prong is not satisfied merely because government approves the specifications submitted by the contractor).

Ordering ordinary off-the-shelf toothpaste in its usual commercial packaging would not satisfy this prong. Ordering special ingredients in a G.I. issue tube would. If the product is not ordered as "by model number, a quantity of stock" merchandise, there is a "significant conflict" with state tort requirements placed on manufacturers supplying the general public. *Boyle v. United Technologies Corp.*, 487 U.S. at 509. As Judge Minor pointed out in his concurrence in *Grispo*, 897 F.2d at 638-39: "Agent Orange itself was composed of stock items, but the Government prescription of how those items should be combined and packaged was the key to the military contractor defense asserted by the manufacturer of that toxic chemical. *See, Agent Orange*, 818 F.2d at 191."

2. Conformity to Specifications

The second element of the government contractor defense requires that the product ordered must have conformed to the government's specifications. *Boyle* does not explicate a standard or level of performance at which courts may deem a contractor's performance as in conformity. In its simplest terms, a product conforms with government specifications when the government "receives what it sought." *Lewis v. Babcock Industries, Inc.*, 985 F.2d 83, 89 (2d Cir. 1993). Further evidence of conformity is provided when the government approves what it receives. *Id.* In *Babcock Industries*, the government requested cables of "certain dimension and

strength characteristics," which it received. *Id.* at 89. The government also inspected and approved the cables. The Second Circuit Court of Appeals held that there were sufficient indicia of conformity with the government's specifications. *Id.*; *see also Zinck v. ITT Corp.* 690 F. Supp. 1331 (S.D.N.Y. 1988) (government inspectors individually inspected each set of night goggles produced). "Nonconformance with a specification means ... that the ... alleged defect must exist independently of the design itself, and must result from a deviation from the required military specifications." *Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431, 435 (5th Cir. 2000).

As a matter of law, satisfaction of the second unit of the government contractor defense requires specific conformity with specifications or government approval of the delivered product. *See, e.g., Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698 (4th Cir. 1989) (holding that appropriate specifications for conformity purposes are detailed quantitative ones and second prong is satisfied when Navy approved adjustments to product); *Smith v. Xerox*, 866 F.2d 135 (5th Cir. 1989) (product would not have been utilized had it not passed inspection); *Quiles v. Sikorsky Aircraft*, 84 F. Supp.2d 154 (D. Mass. 1999) (conclusion of conformance is subject to contrary evidence of non-conformance in fact).

If the government is aware that the product being procured has inherent dangers, the manufacturer is not liable if it follows specifications. *See, e.g. Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992 (7th Cir. 1996) (unsafe placement of exhaust pipe and fuel tank on truck did not deviate from Marine Corps'

specifications). In preparing for war, the armed forces will necessarily knowingly use products and equipment presenting some dangers to our forces or others where the vectors of lethality point towards the enemy.

The conformity prong of *Boyle* is not satisfied if the contractor fails to substantially follow the government's requirements, and the government is not aware of the deviations. *See, e.g., Miller v. United Technologies Corp.*, 233 Conn. 732, 660 A.2d 810 (1995) (contractor must comply with quantitative specifications, not qualitative remarks, precatory goals or safety guidelines); *Pietz v. Orthopedic Equipment Co.*, 562 So.2d 152 (Aia. 1989) (conformity prong is not satisfied when contractor is forced to deviate from specifications even though specifications were deficient). *But see Landgraf v. McDonnell Douglas Helicopter Co.*, 993 F.2d 558 (6th Cir. 1993) (contractor informed Army that design did not exactly follow written specifications and Army approved the departures); *Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 420 (5th Cir. 2001) ("Acceptance and use of an item following its production can establish that the items conformed to its specifications.").

3. Warning of Dangers Not Known to Government

The final element of the government contractor defense requires that the contractor warn the government "about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Boyle*, 487 U.S. at 512. The third prong does not require contractors to warn the government of dangers already known to the government. *Babcock Industries, Inc.*, 985 F.2d at 89-

90. In the military context, it is possible for the government to have greater knowledge of dangers than the contractor, and the third prong may be satisfied if the government "has greater knowledge of the problems" with the product. *Id.* at 90.

It is common for the Armed Forces to procure highly specialized devices or demand novel uses of civilian technology. *See, e.g.*, Defense Advanced Research Projects Agency (DARPA), Technology Transition (1997). As a result, its testing and knowledge of many products necessary in war exceeds that of any private entity. The government often outsources the production of a good, and the contractor is often in no position to warn of dangers since the details of ultimate intended use may not be revealed to it. Where the design and manufacturing of a product is a partnership between government and private interests, the contractor has a duty to warn of dangers not known to the public sector. *Babcock Industries* provides an example of when the government has been long aware of a problem, and its equal knowledge of the dangers immunized the contractor from liability. *Babcock Industries, Inc.*, 985 F.2d at 90.

Similarly, in *Zinck*, the government provided the impetus for the production of night vision goggles. The contractor was brought in after the government initially developed the concept. The district court found that the government was "alerted to the goggles' limitations during field tests, certainly to an extent greater than [the contractor] was." *Zinck*, 690 F. Supp. at 1337. *See also, e.g., Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67 (3d Cir. 1990) (contractor provided engineering memoranda to the Army disclosing that

ten percent of the proposed new bearings would fail); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992 (7th Cir. 1996) (contractor satisfied duty to warn when government and contractor were aware of the same dangers); *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989) (Navy had full knowledge of dangers in the prevailing maintenance protocols); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (contractor must warn only of dangers about which it had some knowledge); *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989) (knowledge that a different but similar product was deficient cannot be imputed to contractor); *Stout v. Borg-Warner Corp.*, 933 F2d 331 (5th Cir. 1991) (danger was so obvious to anyone who observed product in operation that it was unnecessary for contractor to have warned of danger); *Zinck v. ITT Corp.*, 690 F. Supp. 1331, 1336 (S.D.N.Y. 1988) (Army designed product and did field testing and any knowledge regarding dangers of the product was passed from the Army to the contractor); *Crespo v. Unisys Corp.*, 1996 U.S. Dist. LEXIS 20956, 1996 WL 875565 (D.N.J. 1996) (government had superior knowledge of dangers).

C. Claims Based on Failure to Warn

Boyle applies the government contractor defense to design defects, stating that "liability for *design defects* in military equipment cannot be imposed, pursuant to state law ...." 487 U.S. at 512 (emphasis added). HN19 The doctrine has been extended to cases in which the contractor has allegedly failed to satisfy its duty under state law to warn the plaintiff about the dangers associated with the product. In *Grispo*, the court declared:

> When a federal contract and state tort law give contrary messages as to the nature and content of required product warnings, they cause the sort of conflict *Boyle* found so detrimental to the federal interest in regulating the liabilities of military contractors. Just as with conflicting federal and state design requirements, the existence of conflicting federal and state warning requirements can undermine the Government's ability to control military procurement.

897 F.2d 626, 629 (2d Cir. 1990).

In order for the government contractor defense to displace the duty to warn under state tort law, "the applicable federal contract must include warning requirements that significantly conflict with those that might be imposed by state law." *Id.* at 630. Displacement of state law must be preceded by a showing that the contents of the warnings-or the absence of warnings-were dictated by the government. *Densberger v. United Technologies Corp.*, 297 F.3d 66 (2d Cir. 2002) (stating that plaintiffs cannot sue contractors "if government controlled which warnings the contractor was allowed to provide"); *see also Garner v. Santoro*, 865 F.2d 629 (5th Cir. 1989). The test was set out in *Densberger*.

The three requirements of the *Boyle* test for failure-to-warn cases are: (1) 'government control over the nature of product warnings'; (2) 'compliance with the Government's directions'; and (3) 'communication to the Government of all product dangers known to it but not to the Government.'

Densberger, 297 F.3d at 75 n.11 (quoting *Grispo*, 897 F.2d at 630 n.4.). This test also applies to circumstances in which the government dictated that there be no warnings at all. Displacement occurs whether the warnings for general commercial use were required pursuant to state law or federal regulations.

D. Claims Based on Manufacturing Defects

The Supreme Court applied the government contract defense to design defect claims, and the Court of Appeals for the Second Circuit extended the defense to failure-to-warn claims. This circuit has not yet extended *Boyle* to claims based on manufacturing defects. *Compare Zinck v. ITT Corp.*, 690 F. Supp. 1331, 1337 (S.D.N.Y. 1988) (government contractor defense does not apply to manufacturing defect claims), *and Nicholson v. United Technologies* Corp., 697 F. Supp. 598, 603 (D. Conn. 1988) (same), *with Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744 (9th Cir. 1997) (government contractor defense applies).

In deciding whether *Boyle* applies to manufacturing defect claims, courts look to the nature of the conflict between the application of the state tort law and the federal interest in government procurement as described in *Boyle*. In *Grispo*, for example, when extending *Boyle* to failure to warn cases, the court inquired into the nature of any conflicts with the federal interest in regulating government contractors. 897 F.2d at 629. The displacement of state tort law defining manufacturing defects will occur only where a '"significant conflict' exists between an identifiable 'federal policy or interest and the operation of state law.'" *Boyle*, 487 U.S. at 507. In *Boyle*, the Court held

that the duty of care under state tort law of design defects was at odds with the design responsibilities imposed by the United States.

The Court's inquiry did not end with the discovery of a conflict between state law and federal procurement. The government contractor defense was grounded in the Federal Tort Claim Act exemption applicable to "discretionary functions." *Id.* at 511. In *Boyle*, the design of the military equipment involved engineering judgments and thoughtful tradeoffs, all of which fell under the rubric of discretionary functions. Thus, the conflict was resolved by application of the government contractor defense, articulating a three-prong test. *Id.* at 512; *supra* Part IV.B. The federal common law defense was available only if the government wielded significant control over the design process. In extending *Boyle* to failure to warn cases, the Court of Appeals based its decision on whether the "federal contract and state tort law [gave] contrary messages as to the nature and content of required products warnings." *Grispo*, 897 F.2d at 629. The "contrary message" created the type of conflict about which *Boyle* warned and for which the Court crafted the government contractor defense. Under *Grispo*, therefore, when the government controls which warnings the contractor can use, *Boyle* governs.

This court need not determine whether *Boyle* also requires the displacement of the state tort law of manufacturing defects. *See Snell*, 107 F.3d at 744 (defense applicable where government approved precise specifications); *Roll v. Tracor, Inc.*, 102 F. Supp.2d 1200, 1201-02 (D. Nev. 2000) (defects in manufacturing come within the defense if the

government approved the manufacturing technique leading to the deficit). If the government explicitly or implicitly approves the design and method of production and it is aware of resulting defects, *Boyle* would apply as in any design defect case. In the instant case, the government was aware of the manufacturing process that would be used, and that it could result in dioxin's presence in Agent Orange. It thus threw its cloak of contractors defense immunity over Agent Orange producers even though it and they knew of the dioxin in Agent Orange.

In determining the merit of a possible manufacturing defect claim, in the instant case, the court looks to whether defendants satisfied the second prong of the Boyle test, namely whether the product produced was in conformity with the government's specifications. *See, e.g., Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1321 (11th Cir. 1989) ("To say that a product failed to conform to specifications is just another way of saying that it was defectively manufactured."); *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 246 (5th Cir. 1990) (equating a failure to conform to government design specifications with a manufacturing defect); *Zinck*, 690 F. Supp. at 1338 ("For the same reasons that [the defendant] satisfied the second prong of the government contractor defense, plaintiffs cannot prevail on their claim of manufacturing defect.").

As indicated in the section on Facts, Part III, *supra*, and application of Law to Facts, Part V, *infra*, the government was aware that under the manufacturing processes utilized by defendants, dioxin was an inevitable component of Agent Orange. If defendants delivered a product that conformed with the

government's specifications and its expectations, a manufacturing defect claim must fail.

E. Cost of Denying Defense

The Supreme court in *Boyle* was concerned about the cost and difficulty of procurement without the protection provided by the government contractor defense. As it noted:

> The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.

487 U.S. at 507, 108 S. Ct. at 2516. It also declared:

> The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for production.

The cost problem is manifested in the present case

where the defendants paid a large price to settle on the basis of dubious claims when they were only carrying out the government's orders. They are now being faced with possibly huge liabilities should these suits (and many others like it) go forward. Courts applying *Boyle*-based rules need to bear in mind that the legislature can step into the breach and provide compensation should the contractor defense block a private action. In the case of Agent Orange it has done so through a presumptive schedule of V.A. compensation for ill veterans -- including the present plaintiffs. *See also Dalehite v. United States*, 346 U.S. 15, 97 L. Ed. 1427, 73 S. Ct. 956 (1953) (compensation provided by Congress after the Texas City explosion disaster); Texas City Disaster Relief Act, Pub. L. No. 84-378, 69 Stat. 707 (1955); Monograph, Individual Justice in Mass Tort Litigation 17 (1995).

F. Decisions Applying Defense to Agent Orange

The majority opinion in *In re Joint Eastern and Southern District New York Asbestos Litigation (Grispo)*, 897 F.2d 626, 634 (2d Cir. 1990), suggested in *obiter dictum* that *Boyle* may have limited the force of the Court of Appeals' prior Agent Orange based decisions applying the government contractor defense to that product:

> the scope of our holding in *Agent Orange* has been trimmed by *Boyle* such that *Agent Orange* no longer carries the weight Eagle-Picher places upon it. *Agent Orange* grounded the military contractor defense upon broad separation-of-powers concerns counseling the insulation of military decisionmaking from judicial oversight.

> *See Agent Orange*, 818 F.2d at 190-91. Although these concerns certainly animated the Supreme Court's opinion in *Boyle*, *see Boyle*, 108 S. Ct. at 2517-18 (discussing need to prevent judicial "secondguessing" of selection of design of military equipment), *Boyle* ultimately cast the military contractor defense upon narrower grounds than we did in *Agent Orange*. In particular, *Boyle* predicated the military contractor defense upon the existence of a "significant conflict" between federal contracting requirements and state tort duties. For the conflict to be "significant," the Government must control product content by approving "reasonably precise specifications." *See id.* at 2518. *Agent Orange* neither honed in upon the need for a "significant conflict" nor required that government specifications be "reasonably precise." *See Agent Orange*, 818 F.2d at 192 (first element of military contractor defense established upon showing "that the government established the specifications for Agent Orange"). We think these differences underscore the more exacting standard a military contractor must satisfy after *Boyle* to establish the military contractor defense and thus limit the value of the facts of *Agent Orange* as a benchmark in a failure-to-warn action for satisfaction of the military contractor defense after *Boyle*.

(Footnote omitted).

This statement of the *Boyle* rule in that asbestos case--while accurate as to the asbestos case then before the

Court of Appeals for the Second Circuit-- does not mention the fact that Agent Orange fully met the requirements of *Boyle*. First, the government knew more than the manufacturers about the dangers attendant on its design, specifications and manufacturing hazards of Agent Orange and dioxin, so that warnings to the government by defendants were not required. Second, the lack of warnings to users was a requirement of the government which specified exactly how the product was to be packaged in drums with an orange stripe, but no warnings. Third, the government determined how the product would be used. Any suggestion of an implied reservation about applicability of the contractor defense of Agent Orange in the *Joint Asbestos* cases have no bearing on a case involving Agent Orange itself. It should also be noted that the asbestos manufacturer-defendant was authorized to deliver its product in the same packaging it used for civilian consumers. *Id.* at 627 ("Commercial packages are acceptable under this specification."). This was not the case with Agent Orange. As the Court of Appeals for the Second Circuit pointed out in *Densberger*, "In failure to warn cases, ... the ultimate product users cannot sue the contractor for failure to warn if the government controlled which warnings the contractor was allowed to provide *to those users*, and thereby precluded the warnings at issue from being given." 297 F.3d at 75 (emphasis in original).

The trial court correctly noted in *Zinck*, 690 F. Supp. at 1337:

> "It is clear from the record, in light of all the information received to date, that the government knew as much as, or more than, the

> defendant .... There is no substantial basis for believing that further discovery will reveal any persuasive information on this subject." "Agent Orange" Litigation, 611 F. Supp. 1223 at 1263 (E.D.N.Y. 1985) [,aff'd 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234, 101 L. Ed. 2d 932, 108 S. Ct. 2898 (1988).]

The dismissal of Agent Orange claims based upon the government contractor defense was affirmed by the Court of Appeals for the Second Circuit, which stated:

> We agree with the district court that the information possessed by the government at pertinent times was as great as, or greater than, that possessed by the chemical companies.

In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 187, 190 (2d Cir. 1987). This fact has not changed over the years. Even though plaintiffs are not now bound by doctrines of *res judicata, stare decisis* or collateral estoppel from raising the issue anew, examination of the evidence resubmitted in this motion to dismiss mandates that the contractor defense remains a bar to the suit.

The dismissal of Agent Orange claims by this court and the Court of Appeals for the Second Circuit in phases I and II of the Agent Orange litigation was based upon facts that were thoroughly developed during years of discovery. Those facts -- relating to the government's specifications for Agent Orange, defendant's compliance with those specifications, and the knowledge of the government and defendants as to the hazards of Agent Orange -- have remained constant. The papers

submitted on this motion to dismiss and the conclusions to be drawn from them are not disputable; they establish the *Boyle* defense beyond cavil.

Nor has the law's affects, in its operative essential now applied, changed prior Agent Orange conclusions. In *Boyle*, the Supreme Court adopted essentially the same three-pronged test for the application of the government contractor defense that had been applied in this court's 1985 Agent Orange decision:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

487 U.S. at 512.

Five years after *Boyle*, the Court of Appeals for the Second Circuit reiterated that the government contractor defense would still preclude claims of Vietnam veterans and their family members who claimed that their exposure to Agent Orange caused injuries that were manifested after the 1984 settlement. *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d at 1436, *cert. denied*, 510 U.S. 1140, 127 L. Ed. 2d 434, 114 S. Ct. 1125, 114 S. Ct. 1126 (1994):

> It is clear from the chemical companies' contracts with the Government that the Government

> specified Agent Orange's ingredients in great detail. There also is documentary evidence tending to show that the Government strictly prescribed the markings on Agent Orange barrels, and prohibited all extraneous label information, including warnings. Finally, there is evidence that the Government's knowledge of the hazards of Agent Orange and dioxin was at least as great as that of the chemical companies, making it unlikely that there were "dangers ... that were known to the suppliers but not to the United States," of which the suppliers should have warned. *Boyle, supra,* 487 U.S. at 512, 108 S. Ct. at 2518. In sum, although the availability of the government contract defense might not be a foregone conclusion, there is a reasonable probability that it would apply, barring any recovery by the plaintiffs.

The Court of Appeals for the Fifth Circuit, following *Boyle,* conducted a detailed evaluation of the same undisputable Agent Orange facts - now, once again, before this court --with respect to each of the three elements of the government contractor defense. The Court of Appeals for that Circuit expressly agreed with the decisions of this court and the Court of Appeals for the Second Circuit and affirmed summary judgment based on the government contractor defense:

> This case is yet another episode in the great Agent Orange saga. In this appeal, we review the district court's decision to grant the defendant-appellees' motion for summary judgment where the decision was based exclusively on the military contractor defense.

***

> The plaintiffs have failed to demonstrate any genuine issue of material fact with respect to any one of the three elements of the military contractor defense. Thus, the district court properly granted the defendants' motion for summary judgment.

Miller v. Diamond Shamrock, 275 F.3d 414, 416, 423 (5th Cir. 2001).

V. Application of Law to Facts

A. Design Defect Claim

Each element of the Government Contractor Defense has been established. Viewing the pleadings and facts in a way most favorably to plaintiffs, no juror could fail to find:

> 1) The government approved precise specifications for the Agent Orange as set forth in contracts with various administrative agencies and divisions of the Armed Forces. These differed substantially from "off-the-shelf" products the defendants were producing for their civilian markets.
>
> 2) The Agent Orange delivered by defendants conformed to these government specifications. This was verified by close checks through government inspectors.
>
> 3) The government knew substantially more about possible dangers of Agent Orange as it

intended to, and did, use it than did any or all of the defendants combined.

B. Failure-to-Warn Claim

Each element of the Government Contractor Defense has been established. Viewing the pleadings and facts in a way most favorably to plaintiffs, no juror could fail to find:

1)The government had control over the markings, including possible product warnings. It forbade the placement of warnings on the barrels.

2) The Agent Orange delivered by defendants conformed to the government order that there be no product warnings on the Agent Orange. This was verified by close checks through government inspectors.

3) The government knew substantially more about possible dangers of Agent Orange as it intended to, and did, use it than did any or all of the defendants combined.

C. Manufacturing Defect Claim

Having found that the Agent Orange produced by defendants conformed to the government's precise specifications, the manufacturing defect claim cannot stand. Moreover, the government was aware of alternative manufacturing processes that might potentially mitigate the presence of dioxin in Agent Orange. In its quest for maximum production of Agent

Orange as a tool of war, the government's benign connivance failed to specify another production process, sanctioning defendants' use of the then-existing technology, leading inexorably to some dioxin in Agent Orange.

VI. Conclusion

Failure to apply the government contractor defense in cases such as this one would substantially inhibit the United States from obtaining equipment and products for its armed forces in time of emergencies or war. Failure to afford this defense would have the potential of enormously increasing the cost to the government of purchasing such materials because suppliers would have to include in the price the cost of almost unlimited and unknowable possible liability for future tort claims. Added to costs of such prospective suits would be the difficulty of resolving many claims through a global settlement protecting against future claims [degree] a problem illustrated by this very litigation and the overhanging huge numbers of potential future like suits.

The cases are dismissed without costs or disbursements.

VII. Discovery and Stay

At the hearing on this motion to dismiss, plaintiffs explained their failure to adequately respond by noting difficulties in obtaining evidence for their position. This problem is understandable since the events at issue occurred forty or more years ago. Plaintiffs have asked for an additional six months for discovery. *See* Part I,

supra.

To ensure due process, this decision is stayed until October 12, 2004. Discovery on the issues posed by the government contractor defense may continue to August 10, 2004. Plaintiffs may make a motion to reconsider by filing papers on or before September 10, 2004. If made, the motion will be heard on October 10, 2004. In the meantime, the magistrate judge, clerk of the court, other parties and the undersigned will make every effort to assist plaintiffs in consolidated discovery limited to the issues raised on this motion to dismiss.

SO ORDERED.

/S/

Jack B. Weinstein
Senior United States District Judge

Dated: February 9, 2004

MDL No. 381, 98-CV-6383 (JBW), 99-CV-3056 (JBW)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION; JOE ISAACSON and PHILLIS LISA: ISAACSON, Plaintiffs, -against- DOW CHEMICAL COMPANY, et al., Defendants, DANIEL RAYMOND STEPHENSON, et al., Plaintiffs, -against- DOW CHEMICAL COMPANY, et al., Defendants.

November 16, 2004, Decided
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ORDER

JACK B. WEINSTEIN, Senior District Judge:

By order of February 9, 2004 all actions by former members of the armed services who served in Vietnam were dismissed on the ground of the government contractor defense. *In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d 404 (E.D.N.Y. 2004). Plaintiffs requested a stay of the judgment so they could conduct further discovery. All available relevant files were made available. The court and the magistrate judge gave plaintiffs full assistance. To the extent that the long-past events of the herbicide episode of the Vietnam War can be ascertained within acceptable time limits, the parties have had full opportunity to expose them.

In extensive, well researched and drafted papers dated November 3, 2004, plaintiffs move "for this court to reconsider its ruling granting summary judgment to

the defendants on the basis of the government contractor defense." Their documents establish that not all defendants had identical procurement contracts, knowledge of the dangers of contamination with dioxin of the various herbicides they supplied to the government, or knowledge of how they were to be used in Vietnam. Nor did all members of the government have equal knowledge of the dangers in their production and methods of use.

The conclusion remains unshaken, however, that enough responsible members of the government knew as much or more than the defendants about the dangers of Agent Orange and other herbicides as used by our Armed Forces in Vietnam. Equal or superior knowledge must be attributed to the government. Moreover, the chemical mixtures supplied by defendants and packaged according to government specifications were in a form decided upon by the government and applied by it with attendant increased dangers from those risked by civilian users of defendants' generally marketed herbicides designed and packaged for civilian use with appropriate labels and directions. It is not possible to ascertain which plaintiff was exposed to which defendant's herbicide because of the government selected method of packaging, delivery to Vietnam, mixing and application.

Substantial dedicated research at Columbia University has resulted in some successful reconstruction of herbicide aircraft runs. *See, e.g.*, Jeanne Mager Stellman et al., *The Extent and Patterns of Usage of Agent Orange and Other Herbicides in Vietnam*, 422 NATURE 681 (2003). None of the research or information supplied by plaintiffs, or available in the

literature, or in any of the files permits attribution of a particular defendant's product to a particular plaintiff. Exposure, directly or indirectly, of a particular member of the Armed Forces to a particular herbicide attributable to a particular manufacturer is entirely speculative. No further discovery will establish otherwise. That was one of the reasons why the *Agent Orange* litigations have been approached and dealt with on an industry-wide-defendant basis.

It is not possible to disentangle large numbers of contracts and deliveries from an industry-wide responsibility or unitary defense. The detailed attempt by plaintiffs to unravel this tightly knit skein of existing, non-existing and non-available past evidence has failed. It cannot succeed. Attribution of particular product to particular dioxin to particular exposure to cause of a particular injury is impossible except by an industry-wide statistical attribution.

As a matter of fairness and law among the government, these plaintiffs and these defendants, the contractor defense had been established. Despite its deep regard for the plaintiffs and any disease they are suffering, as well as an appreciation of their concern about the use of Agent Orange, the court is barred from assisting them. It is fair, however, to note once again that the use of Agent Orange and other herbicides to clear foliage during the Vietnam War prevented many more American and allied casualties than could possibly be attributed to exposure to such herbicides.

Some concern for the plaintiffs is alleviated by the statute enacted by Congress to compensate diseased United States personnel who served in or near

Vietnam. Under the most minimal standards of proof, they are permitted to rely on the presumption that there is a possibility that their disease was caused by Agent Orange or other herbicides and to receive compensation from the Veterans Administration. *See, e.g., McMillan v. Togus Reg'l Office, Dep't of Veterans Affairs*, 294 F. Supp. 2d 305, 315 (E.D.N.Y. 2003) ("Based on 'statistical associations,' the Academy's studies have resulted in the creation of presumptions that certain diseases are attributable to exposure to Agent Orange for purposes of Veteran's compensation. These 'associations' are not equivalent to cause in a legal sense for such purposes as mass tort liabilities. These presumption decisions are made by the Secretary for Veterans Affairs. A showing of cause to any degree of probability is not required. The result is summarized in the privately funded National Veterans Legal Services Program, *Self-Help Guide on Agent Orange, Advice for Vietnam Veterans and their Families* (2000 plus supplement), financed, in part, by this court from proceeds from an Agent Orange Settlement Fund created by contributions from manufacturers of Agent Orange."). Whatever the truth of plaintiffs' claims of causation, the law that must be applied in this court can offer none of them succor.

No statistical or other analysis to date known to the court would permit a finding supporting a tort verdict of more probable than not specific causation of a particular plaintiff's disease by negligence in a particular defendant's production of dioxin contaminated herbicide used by the United States in Vietnam. Since this issue has not been briefed, the court draws no conclusion from the available scientific data or its lack and does not dismiss on this ground.

Should the Court of Appeals for the Second Circuit remand on the ground that the government contractor defense does not provide a basis for dismissal, the court will address the underlying general and specific causation issues with an open mind and dispatch.

The stay is lifted. Defendants shall submit a specific judgment in favor of each named defendant against each named plaintiff whose claims arise from service in the Armed Forces of the United States.

SO ORDERED
Jack B. Weinstein
Dated: Brooklyn, New York November 16, 2004

MDL No. 381, 04-CV-400

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION; THE VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE/DIOXIN; PHAN THI PHI PHI; et al Plaintiffs,
-- against --
THE DOW CHEMICAL COMPANY; et al Defendants.

March 10, 2005, Decided

OPINION

MEMORANDUM, ORDER and JUDGMENT

JACK B. WEINSTEIN, Senior District Judge:

***

I. Introduction

This case involves claims by Vietnamese nationals and an organization, The Vietnamese Association for Victims of Agent Orange/Dioxin ("VAVAO"), for harms allegedly done to them and their land by the United States' use of Agent Orange and other herbicides during the Vietnam War from 1965 to 1971 and the South Vietnamese government's subsequent use of such herbicides until 1975. They allege that the manufacturer-defendants are responsible under domestic tort law and under international law.

All claims are dismissed for the reasons stated below. Because of the comprehensive nature of the dismissal the court has not addressed individual motions by defendants claiming no connection with the use of herbicides in Vietnam.

A. Domestic Law Tort Claims Defeated by Government Contractor Defense

In *Stephenson v. Dow Chemical Company* (No. 99-CV-3056), *Isaacson v. Dow Chemical Company* (No. 98-CV-6383) and other like cases, United States veterans of the Vietnam War sought damages against the defendants for exposure to Agent Orange during their service in Vietnam. Defendants moved in those cases for summary judgment based on the government contractor defense--in essence, the claim that the government told us to do it and knew at least as much as we did about the dangers. The court granted defendants' motion to dismiss those tort-based claims on the grounds that the contractor defense applied. *See Isaacson v. Dow Chem. Co.*, 304 F. Supp. 2d 404 (E.D.N.Y. 2004) (granting dismissal based on government contractor defense); *see also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187 (2d Cir. 1987)(holding that government contractor defense applies, plus no causation), *aff'g* 611 F. Supp. 1223 (E.D.N.Y. 1985) (holding that government contractor defense applies, plus no causation). The government has expressed agreement with this position. *See* Statement of Interest of the United States, Jan. 12, 2005, at 1 n.2 [hereinafter U.S. Statement of Interest].

Based on plaintiffs' contention that the veterans had had insufficient time for discovery, the court stayed the

judgment of dismissal and granted plaintiffs six months of additional discovery. *Isaacson*, 304 F. Supp. 2d at 442. On plaintiffs' request, further time for discovery and preparation of briefs was then afforded. The magistrate judge, the Clerk of this court, the Special Master, and the National Archives cooperated in making the material sought by plaintiffs available. After full discovery and argument on February 28, 2005, the stay was lifted and judgments of dismissal entered in the veterans' cases because the government contractor defense had been established, warranting summary judgment of dismissal in favor of all defendants. *Isaacson v. Dow Chem. Co.*, 344 F. Supp. 2d 873 (E.D.N.Y. 2004). The materials submitted by the parties after November 16, 2004 furnished additional strong support for dismissal. See order and judgments for defendants issued on March 2, 2005.

The same government contractor issue was raised in defendants' motions under Rule 12(b)(6) of the Federal Rules of Civil Procedure in the instant case as a defense to all claims brought by the Vietnamese. Those claims *based on domestic law--but not international law*--of the United States, of any state of the United States and of Vietnam are dismissed on this ground. See *infra* Parts IV.B.; VI.

The alleged delicts of the manufacturer-defendants occurred with a center of gravity in the United States, where the herbicides were ordered, manufactured and delivered to the government. Whatever the substantive domestic law applicable under any conflicts of law rule, the government contractor defense applies to that law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 159 L. Ed. 2d 718, 124 S. Ct. 2739, 2752 (2004) ("It is true that the

traditional approach to choice of substantive tort law has lost favor, [Gary J.] Simson, *The Choice-of-Law Revolution in the United States: Notes on Rereading Von Mehren*, 36 CORNELL INT'L L.J. 125, 125 (2003) ('The traditional methodology of place of wrong . . . has receded in importance, and new approaches and concepts such as governmental interest analysis, most significant relationship, and better rule of law have taken center stage' (footnotes omitted))."); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1254-55 (E.D.N.Y. 1984) (finding that negligence, if any, of corporate suppliers of herbicides took place in United States); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984) (finding that federal or national consensus law applies under conflicts rules); *infra* Part VIII.H.; *cf. Sosa*, 124 S. Ct. at 2754 (holding that the Federal Tort Claims Act's foreign country exception "bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.").

For domestic conflicts of law purposes the government contractor defense is a federal substantive rule. Neither the rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), nor comity in recognizing the internal substantive law of another nation can trump this federal substantive rule of law. *See infra* Part VIII.H. For the same reasons that the veterans' claims in *Stephenson*, *Isaacson* and similar cases were dismissed, all domestic law claims of the Vietnamese are dismissed. See *infra* Parts IV.B.; VI.

B. International Law Claims

1. General Approach of United States Courts

In judging international human rights claims against domestic corporations or others, courts in the United States with jurisdiction act as quasi international tribunals. *See, e.g.*, LORI FISLER DAMROSCH, LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW CASES AND MATERIALS 645 (4th ed. 2001) ("The international law of human rights parallels and supplements national law, superseding and supplying the deficiencies of national constitutions and laws . . . ." (quoting THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 7 (Louis Henkin ed., 1981))); PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 112 (Routledge 7th rev. ed. 1997) ("International law allows states to exercise universal jurisdiction over certain acts which threaten the international community as a whole and which are criminal in all countries, such as war crimes . . . ."); Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 268-82 (2005) (discussing universal jurisdiction); Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765 (2004). Our courts will treat foreigners relying on international law with the same due process and courtesy as they would our own nationals.

Federal common law, not *Erie*, governs. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964) (noting that

constitutional and statutory provisions indicate "a desire to give matters of international significance to the jurisdiction of federal institutions"); Paul S. Ryerson, *Inconsistent Consistency: A Comment on Arrested Development of the Federal Common Law of Foreign Relations*, 16 FLA. J. INT'L L. (forthcoming 2005, filed and docketed); *infra* Part VIII.H.

International law is internalized by our courts as law of the United States. As recognized by the Restatement (Third) of the Foreign Relations Law of the United States, "the jurisprudence of the United States has considered . . . rules of international law themselves (and many international agreements) to be incorporated into the law of the United States." 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 cmt. a (1987); *see also id.* § 1 reporters' note 4 ("Courts interpret the laws and international agreements of the United States and they determine international law as law of the United States."). "From the beginning, the law of nations, later referred to as international law, was considered to be incorporated into the law of the United States without the need for any action by Congress or the President . . . ." *Id.* introductory note to pt. I, ch. 2, at 41. Reflecting general understanding, the Restatement's position permits individual court actions within the United States for at least some violations of international law. It declares: "A person of foreign nationality . . . may pursue any remedy provided by . . . the law of another state . . . ." 2 *id.* § 713(2)(c); *see also id.* § 703 reporters' note 7 (discussing individual remedies under United States law). See also *infra* Part VIII.H. on choice of law.

In deciding the scope and nature of applicable substantive rules of international law, this court has followed Rule 44.1 of the Federal Rules of Civil Procedure which governs the determination of foreign law. FED. R. CIV. P. 44.1; *cf.* N.Y. C.P.L.R. § 4511 (McKinney 1992 & Supp. 2005) (addressing judicial notice). A federal court has wide discretion to do its own research as well as to rely upon experts in the somewhat similar fields of foreign or international law. *See, e.g.*, Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613 (1967); Comm. on Int'l Commercial Dispute Resolution, Ass'n of the Bar of the City of N.Y., *Proof of Foreign Law after Four Decades with Rule 44.1 FRCP and CPLR 4511* (forthcoming 2005). The lack of judicial expertise and the complexity of sources in these two fields--foreign and international law--often make it desirable for the court to seek assistance. In this case academic experts for defendants, plaintiffs and the government, as well as counsel, have supplemented the court's own research and furnished helpful and reliable professional advice on the subject of international law. *See, e.g., Burger-Fischer v. Degussa AG*, 65 F. Supp 2d 248, 257 (D.N.J. 1999) (relying heavily on an international law expert's submission to the court). The opinions of Professor George P. Fletcher [hereinafter Fletcher Op.] and Professor Jordan J. Paust [hereinafter Paust Op.] submitted on behalf of plaintiffs and the brief of amici were learned and compelling except for their view that military use of Agent Orange in Vietnam was a tort in violation of the law of nations. *See infra* Part XI. Other learned opinions submitted on behalf of defendants, relied upon and quoted in the body of this memorandum, were compelling in their

conclusion that no violation of international law by defendants can be shown.

2. Government Contractor Defense Not Applicable

As indicated in more detail below in Part IX, the government contractor defense does not apply to violations of human rights, norms of international law and related theories. *See, e.g., Zyklon B Case (Trial of Bruno Tesch and Two Others)*, 1-5 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93-102 (William S. Hein & Co. 1997) (U.N. War Crimes Comm'n ed., 1949); *United States v. Krupp*, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1327, 1437-39 (photo. reprint 1997) (1950) [hereinafter TRIALS OF WAR CRIMINALS]; *United States v. Flick*, 6 TRIALS OF WAR CRIMINALS 1187, 1198, 1202 (photo. reprint 1997) (1952); *see also infra* Part IX. Defendants' motion to dismiss the international law claims on the ground of the government contractor defense is denied. Even in light of the Supreme Court's restrictive interpretation of applicable international law in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 159 L. Ed. 2d 718, 124 S. Ct. 2739 (2004), plaintiffs' international law based causes of action under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 (2000), (which caselaw has also referred to as the Alien Tort Claims Act ("ATCA") or Alien Tort Act ("ATA"), *see Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 143 & n.1 (2d Cir. 2003)), are not barred by the government contractor defense. *See infra* Part IX.

3. Substantive Merit Lacking

Detailed analysis of international law claims of the Vietnamese plaintiffs establishes that use of herbicides by or on behalf of the United States in Vietnam before 1975 was not a violation of international law. Use by the United States ended in early 1971; responsibility of defendants for that use did not extend beyond 1971 since private corporate liability in this case could arise only from the foreseeable action of a customer--the United States. Herbicide spraying by the United States violated no rights of plaintiffs under international law. *See infra* Part XI.

II. Use of Agent Orange and Other Herbicides in Vietnam War

There has been a great deal written on the development and use of herbicides in war. See also *infra* Parts IV.A.3.-4. The most recent comprehensive description is by Professor Jeanne Mager Stellman of Columbia University, New York, and her associates; it is heavily relied upon and in part copied without specific attribution in the rest of this Part. *See* Jeanne Mager Stellman et al., *The Extent and Patterns of Usage of Agent Orange and Other Herbicides in Vietnam*, 422 NATURE 681 (2003); *see also* Declan Butler, *Flight Records Reveal Full Extent of Agent Orange Contamination*, 422 NATURE 649 (2003) (stating that Stellman's study shows that herbicides were directly sprayed on hamlets containing between two and four million people); David A. Butler, Connections--The Early History of Scientific and Medical Research on "Agent Orange" (Feb. 17, 2005) (unpublished manuscript, filed and docketed). No study or technique presented to the court has demonstrated how it is now possible to connect the herbicides

supplied by any defendant to exposure by any plaintiff to dioxin from that defendant's herbicide. *See generally* MICHAEL GOUGH, DIOXIN, AGENT ORANGE: THE FACTS (1986) (discussing scientific problems in proving causation); *see also* Jonathan Walter, *US Cancels Agent Orange Study in Vietnam*, NEW SCIENTIST, Mar. 20, 2005 (reporting that the United States National Institute of Environmental Science cancelled the research project under the 2003 United States-Vietnam agreement that would have looked at the health effects of dioxin), http://www.newscientist.com/article.ns?id=dn7146.

Between 1961 and 1971, herbicide mixtures--nicknamed by the colored identification band painted on their 208-litre storage barrels--were used by the United States and Republic of Vietnam ("RVN") forces to defoliate forests and mangroves, to clear perimeters of military installations and to destroy "unfriendly" crops, as a tactic for decreasing enemy armed forces protective cover and food supplies. United States participation ended in 1971 but the RVN forces allegedly continued independently to use leftover barrels of herbicides until 1975.

The best-known mixture was Agent Orange. About 65% of the herbicides contained 2,4,5-trichlorophenoxyacetic acid (2,4,5-T), which was contaminated with varying levels of 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD). Herbicide mixtures used are listed in Table I.

Table I
Use of military herbicides in Vietnam by United States (1961-1971)

(Source: Stellman, supra, at 682.)

Name	Chemical constituents	Concentration active ingredient	Years used	Estimated quantities sprayed (litres)
Agent Pink	60%-40% n-Butyl;	961-1,081	1961; 1965	50,312 sprayed;
	isobutyl ester of	gl<-1> acid		413,852
	2,4,5-T	equivalent		additional on
				procurement
				records
Agent Green	n-Butyl ester	(Should have	(Unclear but	31,026 shown on
	2,4,5-T	same acid	within time	procurement
		equivalent as	frame for	records
		Agent Pink)	Agent Pink)	
Agent Purple	50% n-Butyl ester	1,033 gl<-1>	1962-1965	1,892,773
	2,4-D;	acid equivalent		
	30% n-butyl ester			
	2,4,5-T;			
	20% isobutyl			
	ester 2,4,5-T			

Table I

Use of military herbicides in Vietnam by United States (1961-1971)

(Source: Stellman, supra, at 682.)

Name	Chemical constituents	Concentration active ingredient	Years used	Estimated quantities sprayed (litres)
Agent Orange	50% n-Butyl ester 2,4-D; 50% n-butyl ester 2,4,5-T	1,033 gl<-1> acid equivalent	1965-1970	45,677,937 (may include Agent Orange II)
Agent Orange II	50% n-Butyl ester 2,4-D; 50% isooctyl ester 2,4,5-T	910 gl<-1> acid equivalent	After 1968 (?)	Unknown but at least 3,591,000 shipped
Agent White	Acid weight basis: 21.2% tri-isopropanolamine salts of	By acid weight: 240.2 gl<-1> 2,4-D and 64.9 gl<-1>	1966-1971	20,556,525

Table I
Use of military herbicides in Vietnam by United States (1961-1971)
(Source: Stellman, supra, at 682.)

Name	Chemical constituents	Concentration active ingredient	Years used	Estimated quantities sprayed (litres)
		picloram		
	2,4-D and 5.7%			
	picloram			
Agent Blue	Cacodylic acid	Acid: 65%	1962-1964	25,650
(powder)	(dimethylarsinic	active		
	acid) and sodium	ingredient;		
	cacodylate	salt: 70%		
		active		
		ingredient		
Agent Blue	21% sodium	Acid weight:	1964-1971	4,715,731
(H[2]O	cacodylate +	360.3 gl<-1>		
solution)	cacodylic acid to			
	yield at least			
	26% total acid			
	equivalent by			
	weight			

Military herbicide operations in Vietnam became a matter of scientific controversy almost from their inception. In April 1970, 2,4,5-T was banned from most United States domestic uses on the basis of evidence of its possible teratogenicity. Long after the war, the Agent Orange Act of 1991 requested the Institute of Medicine ("IOM") to assess the strength of the evidence for association between exposure to military herbicides and disease in veterans and the feasibility of conducting further epidemiological studies.

The Department of Defense's Advanced Research Project Agency's ("ARPA") Project Agile was instrumental in the United States' development of herbicides as a military weapon, an undertaking inspired by the British use of 2,4,5-T to destroy jungle-grown crops during the insurgency in Malaya. ARPA supported tests on combinations and concentrations of herbicides; calibration studies of the spray delivery system to achieve the desired 281ha<-1> (3 gallons/acre) rate; and experiments on optimal conditions to minimize spray drift. ARPA also developed the Hamlet Evaluation System ("HES") which collected the political census data used for estimating population exposures.

The first large-scale United States military defoliation took place in Camp Drum, New York, in 1959, using Agent Purple (a 50-50 mixture of 2,4-D and 2,4,5-T) and a spray system which was the model for those used in Vietnam. Herbicide tests were run from August to December 1961 in the RVN using dinoxol and trinoxol. An insecticide test series was also undertaken. The first major herbicide shipment arrived in RVN in January 1962; defoliation targets were sprayed during

September and October 1962 (Agent Purple); crop destruction targets were sprayed in November 1962 (Agent Blue). Systematic testing of herbicides and calibration of herbicide delivery systems continued for several years.

United States Air Force ("USAF") operations, codenamed Operation Ranch Hand, dispersed more than 95% of all herbicides used in Operation Trail Dust, the overall herbicide program. Other branches of the United States armed services and RVN forces, generally using hand sprayers, spray trucks (Buffalo turbines), helicopters and boats, sprayed much smaller quantities of herbicide. Crop destruction required White House approval until 1963, after which final approval was delegated to the United States Ambassador to the RVN.

In total about 1.9 million litres of Agent Purple were sprayed between 1962 and 1965. This timing is a particularly significant because herbicides manufactured in the early 1960s were almost certainly more heavily TCDD-contaminated than those produced later. Pre-1965 spraying was limited to a relatively small area which may be at particular risk for current TCDD contamination.

Contamination of 2,4,5-T with TCDD varied widely by production run, manufacturer, and the percentage of 2,4,5-T in the formulation. In early 1966, Agent White, which did not contain 2,4,5-T and hence was not TCDD-contaminated, began to replace Agent Orange. From a tactical perspective Agent White was less satisfactory than Agent Orange because several weeks were required for defoliation to begin. Agent White was

accepted by the Department of Defense because Agent Orange was apparently no longer available in sufficient quantities. Agent Blue was the agent of choice for crop destruction by desiccation throughout the Vietnam War, but more than four million litres of the other agents, primarily containing 2,4,5-T, were also used on crops.

Procurement records show that at least 464,164 litres of Agent Pink and 31,026 litres of Agent Green, with comparatively high TCDD levels, were purchased. Identified missions dispersed about 1.9 million litres of Agent Purple.

Estimates of how much TCDD was deposited in Vietnam are based on estimates of the volume of 2,4,5-T-containing herbicide sprayed and on TCDD contamination levels. After Agent Orange spraying by the United States ended, the USAF was required to dispose of very large stockpiles of surplus herbicide that were ultimately incinerated aboard the M/T *Vulcanus* in 1977. TCDD concentrations ranged from 6.2 to 14.3 p.p.m., and averaged 13.25 p.p.m. in samples drawn for incineration-effluent modelling studies from 28 different barrels chosen by the USAF as representative of the seven manufacturers contributing to the stockpile. In other samples drawn from the stockpile, the TCDD range was about 0.05 to 13.3 p.p.m. (weighted average 1.77 p.p.m). Documentation also reports dioxin levels to be heterogeneous even within the same production run.

In 1971 an analysis by the National Academy of Science's comprehensive study of ecological and physiological effects of defoliation in Vietnam ("NAS-

1974") found TCDD levels ranging from non-detectable (<0.0012 p.p.m) to 0.0233 p.p.m, and 2,4,5-T residue from non-detectable (<0.02 p.p.m.) to 0.61 p.p.m in six core soil samples collected from the central calibration grid at Pran Buri, Thailand, over which all ARPA test flights had flown. NAS-1974 estimated the original herbicide from those tests to have contained <<3 to 50 p.p.m. TCDD.<para>Although Agent Purple is likely to have been more highly contaminated with TCDD, it is not unlikely that mean TCDD levels in Agent Orange were higher than 3 p.p.m. for much of the herbicide used. An average value closer to 13 p.p.m. may be realistic. If 3 p.p.m., the mean associated with the "low dioxin" series, is conservatively applied, the estimate of total TCDD present in the spray grows to 221 kg. Applying 32.8 p.p.m. and 65.5 p.p.m. as the average TCDD in Agents Purple and Pink provides an additional 165 kg, or 366 kg in total (which does not take into account the herbicides sprayed by RVN forces, and possibly by United States Army and Navy forces by trucks, boats, hand sprayers and helicopters, nor the more than 400,000 litres of Agent Pink shown in procurement records but not found in any recorded missions).

A HES in which United States district advisors and Vietnamese district chiefs filled out monthly political survey and census forms was established in June 1967, and a gazetteer of place names and precise geographical locations was also created. The HES data provide a comprehensive rural census that permits estimates of the numbers of hamlets and size of the population directly sprayed.

More than 20,585 unique hamlets are represented in the

corrected version of the Stellman database. Population data are not available for 18% of these hamlets and population data are not systematically reported each month for all years. Among the hamlets with some population data, 3,181 were sprayed directly and at least 2.1 million but perhaps as many as 4.8 million people would have been present during the spraying. Another 1,430 hamlets were also sprayed, but there is no estimate of the population involved. In all, at least 3,851 out of 5,958 known fixed-wing missions had flight paths directly over the hamlet coordinates given in the HES and gazetteer data. About 35% of the total herbicide sprayed was flown by these missions, although, in general, flight paths extended beyond hamlet borders.

In 1971, NAS-1974 analyzed five soil samples from an area in which large amounts of Agent Orange had been dumped in December 1968. No 2,4,5-T could be detected.

Empty barrel residues led to inadvertent defoliation of trees and gardens in Da Nang, Nha Trang, Bien Hoa, Phu Cat and Saigon civilian areas near USAF airbases that handled the herbicides when the empty barrels were transported to local merchants for commercial use. The ultimate fate of most of the empty barrels is not known. Also unknown is the extent of possible exposure of people who used the barrels for other purposes.

Large numbers of Vietnamese civilians appear to have been directly exposed to herbicidal agents, some of which were sprayed at levels at least an order of magnitude greater than for similar United States

domestic purposes. Yet, according to Professor Stellman, no large-scale epidemiological study of herbicides and the health of either the Vietnamese population or war veterans has yet been carried out. The data from mortality and morbidity records, at least in the United States, should be available for causation studies, but no such study of significance has been made. Those studies supporting Veterans Administration decisions to declare some diseases presumptively caused by Agent Orange as a basis for disability payments (extremely low probability required) are of almost no use in determining causation for litigation purposes (more probable than not shown by admissible proof required).

By 1970, or certainly by 1971, herbicide spraying by United States forces had ceased. David A. Butler, Connections--The Early History of Scientific and Medical Research on "Agent Orange" 8 (Feb. 17, 2005) (unpublished manuscript, filed and docketed) ("On January 7, 1971, aerial spray missions came to an end."). Plaintiffs concede that "military use of 2,4,5-T, including Agent Orange," was suspended on April 15, 1970, and other herbicides were not used after "January 1971, when the last Ranch Hand Mission took place." Mem. of Law in Opp'n To Defs.' Mot. to Dismiss All Claims for Failure to State a Claim Under the Law of Nations, Jan. 18, 2004, at 147 [hereinafter Pls.' Mem. of Law in Opp'n to Defs.' Mot.]. This is long before the 1975 termination claimed by plaintiffs. *See* Figure 1. The discussion below in Part XI demonstrates that international law did not outlaw the kind of use of herbicides complained of before 1975.

Figure 1. Time course of herbicide sorties. At least

19,905 sorties were run between 1961-1971 (1-34 daily, with a daily average of 10.7 sorties). Source: Stellman, *supra*, at 685.

[SEE Figure 1 IN ORIGINAL]

III. Prior Phases of Agent Orange Litigation

The extensive prior procedure in other phases of the Agent Orange litigation is assumed to be known or available to the reader. *See Dow Chem. Co. v. Stephenson*, 539 U.S. 111, 156 L. Ed. 2d 106, 123 S. Ct. 2161 (2003) (per curiam); *Stephenson v. Dow Chem. Co.*, 346 F.3d 19 (2d Cir. 2003) (per curiam) (vacating dismissal because, *inter alia*, All Writs Act did not provide removal jurisdiction); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001) (vacating dismissal because plaintiffs were not adequately represented in prior litigation that resulted in Agent Orange settlement and thus *res judicata* did not bar them from pursuing their claims), *aff'd in part, vacated in part by* 539 U.S. 111, 156 L. Ed. 2d 106, 123 S. Ct. 2161 (2003); *Miller v. Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001) (holding that plaintiff's claims were barred by the government contractor defense); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998)(holding that plaintiffs' claims were barred by the government contractor defense); *Jenkins v. Agent Orange Settlement Fund*, 1997 U.S. App. LEXIS 35613, No. 97-7538, 1997 WL 774394 (2d Cir. Dec 17, 1997) (unpublished disposition); *Addington v. Agent Orange Veterans Payment Program*, 1997 U.S. App. LEXIS 39372, No. 97-7071, 1997 WL 738070 (2d Cir. Nov 24, 1997) (unpublished disposition); *Gough v. Agent Orange Settlement Fund*, 1996 U.S. App. LEXIS 29000, No. 96-

6067, 1996 WL 636536 (2d Cir. Nov 5, 1996) (unpublished disposition); *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993); *In re Ivy*, 901 F.2d 7 (2d Cir. 1990) (MDL Panel had jurisdiction to transfer); *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir. 1987) (holding there was no abuse of discretion in unsealing documents); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir.1987) (appeal reviewing settlement plan); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194 (2d Cir. 1987) (affirming dismissal of Federal Tort Claims Act claims of servicemen); *In re "Agent Orange"* Prod. Liab. Litig., 818 F.2d 204 (2d Cir.1987); *In re "Agent Orange"* Prod. Liab. Litig., 818 F.2d 210 (2d Cir.1987); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216 (2d Cir.1987); *In re "Agent Orange"* Prod. Liab. Litig., 818 F.2d 226 (2d Cir.1987); *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14 (2d Cir. 1986) (denying motion to disqualify plaintiffs' attorneys from appealing settlement); *In re "Agent Orange" Prod. Liab. Litig.*, 804 F.2d 19 (2d Cir. 1986) (denying repeal of stay on settlement funds pending appeal); *In re "Agent Orange" Prod. Liab. Litig.*, 787 F.2d 822 (2d Cir. 1986) (dismissing claims of non-class plaintiffs against defendant not named in complaints); *Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chem. Co.*, 327 F. Supp. 2d 198 (E.D.N.Y. 2004) (inviting U.S. government to submit brief as amicus curiae); *Isaacson v. Dow Chem. Co.*, 304 F. Supp. 2d 404 (E.D.N.Y. 2004) (holding that defendants were entitled to government contractor defense but staying decision pending discovery); *Isaacson v. Dow Chem. Co.*, 304 F. Supp. 2d 442 (E.D.N.Y. 2004) (holding that defendants were entitled to remove action to federal court under federal officer removal statute); *In re "Agent Orange" Prod. Liab.*

Litig., No. 97 CV 1976, 1999 WL 1045197 (E.D.N.Y. Jan. 21, 1999); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 902 (E.D.N.Y. 1991) (plaintiffs cannot collaterally attack prior settlement); *In re "Agent Orange" Prod. Liab. Litig.*, 689 F. Supp. 1250 (E.D.N.Y. 1988) (modifying class assistance program as required by 818 F.2d 179, approved settlement and granting opt-out plaintiffs opportunity to opt into class for purposes of benefitting from settlement fund); *In re "Agent Orange" Prod. Liab. Litig.*, 603 F. Supp. 239 (E.D.N.Y. 1985) (dismissing claims of veterans' wives and children against government), *aff'd in part, vacated in part*, 818 F.2d 201 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985) (modifying protective orders); *In re "Agent Orange" Prod. Liab. Litig.*, 618 F. Supp. 625 (E.D.N.Y. 1985) (approving distribution plan of Agent Orange settlement fund allocated to Australia and New Zealand); *In re "Agent Orange" Prod. Liab. Litig.*, 618 F. Supp. 623 (E.D.N.Y. 1985) (approving settlement of class action and dismissing with prejudice claims of class members) (Special Masters for Settlement Kenneth R. Feinberg and David I. Shapiro); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1452 (E.D.N.Y. 1985) (denying motion to set aside attorney fee-sharing arrangement), *rev'd in part*, 818 F.2d 216 (2d Cir. 1987), *cert. denied*, 484 U.S. 926 (1987); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985) (establishing plan for disbursement of settlement fund pending appeals), *aff'd in part, rev'd in part*, 818 F.2d 179 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985) (determining class-action plaintiffs' attorney fees and reaffirming settlement); *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987); *In re "Agent*

Orange" Prod. Liab Litig., 611 F. Supp. 1290 (E.D.N.Y. 1985) (dismissing claim of civilian physician for failure to demonstrate exposure to herbicides), *aff'd in part, vacated in part*, 818 F.2d 210 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1285 (E.D.N.Y. 1985) (dismissing action brought by Hawaiian civilians), *aff'd in part, vacated in part*, 818 F.2d 210 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1267 (E.D.N.Y. 1985) (same), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985) (ruling as to admissibility of opt-out plaintiffs' scientific evidence and expert testimony and granting summary judgment in favor of defendants for plaintiffs' failure to establish causation), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1221 (E.D.N.Y. 1985) (dismissing defendants' claim for indemnity from government for settlement payments to veterans' families), *aff'd*, 818 F.2d 204 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 105 F.R.D. 577 (E.D.N.Y. 1985) (affirming with modification magistrate's order that defendants in two non-settled cases produce deponents); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (approving settlement of class action subject to fairness hearings); *In re "Agent Orange" Prod. Liab. Litig.*, 101 F.R.D. 97 (E.D.N.Y. 1984) (ordering in camera disclosure of names of scientists deleted from government report); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242 (E.D.N.Y. 1984) (reinstating third-party plaintiffs' claim for indemnity against government with respect to claims of veterans' wives and children), *mandamus denied*, 733 F.2d 10 (2d Cir.

1984), *appeal denied*, 745 F.2d 161 (2d Cir. 1984), *cert. denied*, 465 U.S. 1067 (1984); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984) (finding national consensus law on issues of liability, government contractor defense and punitive damages); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 778 (E.D.N.Y. 1984) (denying motion to implead suppliers of chemical components); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983) (certifying Rule 23(b)(3) and Rule 23(b)(1)(B) classes), *appeal denied*, 100 F.R.D. 735 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 99 F.R.D. 645 (E.D.N.Y. 1983) (lifting prior protective order applying to government documents obtained during discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 99 F.R.D. 338 (E.D.N.Y. 1983) (approving discovery recommendations of special master); *In re "Agent Orange" Prod. Liab. Litig.*, 571 F. Supp. 481 (E.D.N.Y. 1983) (granting motion of law firm to be relieved as lead counsel for plaintiffs and appointing new plaintiffs' management committee); *In re "Agent Orange" Prod. Liab. Litig.*, 570 F. Supp. 693 (E.D.N.Y. 1983) (clarifying program for discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 558 (E.D.N.Y. 1983) (approving special master's order of additional discovery to clarify circumstances surrounding document destruction); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 557 (E.D.N.Y. 1983) (ordering special master to review discovery decisions in light of court's decision to try causality and liability issues); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 554 (E.D.N.Y. 1983) (denying request for reconsideration of order to unseal documents); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 539

(E.D.N.Y. 1983) (adopting special master's order to unseal documents in connection with summary judgment motions); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 522 (E.D.N.Y. 1983) (adopting order of special master concerning discovery of government documents); *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263 (E.D.N.Y. 1983) (granting summary judgment for four defendants on government contractor defense; denying summary judgment for other defendants); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 542 (E.D.N.Y. 1983) (affirming special master's denial of discovery request); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 541 (E.D.N.Y. 1983) (denying interlocutory appeal of decision deferring certification of class and determination of appropriate notice); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 427 (E.D.N.Y. 1983) (adopting special master's procedures for discovery of documents possibly subject to executive privilege); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 424 (E.D.N.Y. 1983) (adopting special master's protective order for Department of Agriculture documents); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 424 (E.D.N.Y. 1983) (adopting protective order); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 587 (E.D.N.Y. 1983) (adopting with modifications special master's order regarding videotaped depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582 (E.D.N.Y. 1983) (rejecting first amendment challenge to protective order); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 578 (E.D.N.Y. 1983) (adopting special master's protective order for discovery of government documents); *In re "Agent Orange" Prod. Liab. Litig.*, 95 F.R.D. 192 (E.D.N.Y. 1982) (affirming special master's ruling as to location of depositions); *In re "Agent*

Orange" Prod. Liab. Litig., 95 F.R.D. 191 (E.D.N.Y. 1982) (clarifying that denial of motion to implead suppliers was without prejudice); *In re "Agent Orange" Prod. Liab. Litig.*, 544 F. Supp. 808 (E.D.N.Y. 1982) (denying motion to disqualify defense attorneys; provisionally dismissing claims against certain non-manufacturer defendants, and denying motion to implead suppliers); *In re "Agent Orange" Prod. Liab. Litig.*, 94 F.R.D. 173 (E.D.N.Y. 1982) (appointing special master to supervise discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 537 F. Supp. 977 (E.D.N.Y. 1982) (provisionally dismissing claims against non-manufacturer defendant); *In re "Agent Orange" Prod. Liab. Litig.*, 534 F. Supp. 1046 (E.D.N.Y. 1982) (denying reargument on dismissal of government as third-party defendant, denying interlocutory appeal, provisionally dismissing claims against non-manufacturer defendants, denying motion to form steering committee for plaintiffs' counsel, denying motion for decertification of class, deferring decision on statute of limitations issues, and establishing elements of government contractor defense); *In re "Agent Orange" Prod. Liab. Litig.*, 93 F.R.D. 514 (E.D.N.Y. 1982) (allowing defendant to proceed with scheduled destruction of documents); *In re "Agent Orange" Prod. Liab. Litig.*, 91 F.R.D. 618 (E.D.N.Y. 1981) (allowing motion to amend caption, denying motion to amend complaint, denying defendants' motion for summary judgment on government contractor defense); *In re "Agent Orange" Prod. Liab. Litig.*, 91 F.R.D. 616 (E.D.N.Y. 1981) (establishing committee to review procedures for videotaped depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980) (dismissing claims against government as third-party defendant, establishing case management plan,

conditionally certifying Rule 23(b)(3) class, and denying defendants' motion for summary judgment); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 757 (E.D.N.Y. 1980) (requiring plaintiffs to file individual notices to retain right to bring actions against federal government); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 756 (E.D.N.Y. 1980) (establishing agenda for status conference); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 754 (E.D.N.Y. 1980) (ordering videotaped deposition); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 753 (E.D.N.Y. 1980) (various orders concerning modification of complaint and answers); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp 750 (E.D.N.Y. 1980) (ordering government to refrain from destruction of documents pursuant to internal procedure); *In re "Agent Orange" Prod. Liab. Litig.*, 28 Fed. R. Serv. 2d 993 (E.D.N.Y. 1980) (granting motion of terminally ill plaintiff to videotape his own deposition); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 737 (E.D.N.Y. 1979) (finding subject matter jurisdiction on basis of federal common law issues), *rev'd*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); *In re "Agent Orange" Prod. Liab. Litig.*, 475 F. Supp. 928 (E.D.N.Y. 1979) (dismissing federal constitutional and statutory claims, reserving possible federal common law claims, denying motion to limit communications to third parties); *see also Ryan v. Dow Chem. Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992); *Ryan v. Dow Chem. Co.*, 1991 U.S. Dist. LEXIS 16532, Nos. 79 CIV. 747, MDL 381, 89 CIV. 3361 & 90 CIV. 3928, 1991 WL 243311 (E.D.N.Y. Nov 12, 1991); *In re Agent Orange Fee Application of Yannacone*, 139 F.R.D. 581 (E.D.N.Y. 1991); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 902 (E.D.N.Y. 1991).

IV. Pleadings by Vietnamese Plaintiffs and Motions by Defendants

Vietnamese nationals and a Vietnamese organization, VAVAO, sue corporations based in the United States for, in essence, committing violations of domestic and international law by manufacturing and supplying herbicides to the governments of the United States and South Vietnam, which were sprayed, stored and spilled in Vietnam from 1961 to 1975. Damages are sought for the deaths and injuries of the plaintiffs and the class that they seek to represent allegedly caused by exposure to the herbicides. Environmental abatement, clean-up of contaminated areas and disgorgement of profits are also sought.

A. Pleadings by Plaintiffs

1. Jurisdiction and Venue

Jurisdiction is invoked under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 (2000); diversity, 28 U.S.C. § 1332 (2000); regulation of commerce, 28 U.S.C. § 1337 (2000); and federal question, 28 U.S.C. § 1331 (2000). Pendent jurisdiction over state law claims is alleged. 28 U.S.C. § 1367 (2000). Venue is vested in the Eastern District of New York, 28 U.S.C.A. § 1391 (1993 & Supp. 2004), under control of the Judicial Panel on Multidistrict Litigation, 28 U.S.C. § 1407 (2000), for pretrial purposes only. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 140 L. Ed. 2d 62, 118 S. Ct. 956 (1998) (limiting power of multidistrict litigation transferee court to pretrial control).

2. Parties

A number of the individual plaintiffs appear to have been members of hostile military forces during the Vietnam War. They probably would have been entitled to less protection--if any--than civilians. Nevertheless, for purposes of this motion to dismiss and this memorandum, their status is not relevant. Their claims are analyzed as if they were civilians not involved in hostile acts against forces of the United States and its allies. The plaintiffs are self-described below:

VAVAO is a Vietnamese not-for-profit, non-governmental organization whose membership consists of victims of exposure to herbicides used during the Vietnam War as well as individuals and groups who volunteer to provide assistance to victims. The purpose of the organization is to represent and protect the interests of Vietnamese who allege exposure to herbicides produced by defendants, and to raise funds for their treatment and care and for mitigation of alleged harmful effects of environmental contamination. The organization is apparently run by an executive board consisting of such Vietnamese, medical and scientific researchers, as well as people from other disciplines.

Plaintiffs Phan Thi Phi Phi, Nguyen Van Quy, Vu Thi Loan, Nguyen Quang Trung, Nguyen Thi Thuy Nga, Duong Quynh Hoa, Huynh Trung Son, Ho Kan Hai, Nguyen Van Hoang, Ho Thi Le, Ho Xuan Bat, Nguyen Muoi, Nguyen Dinh Thanh, Dang Thi Hong Nhut, Nguyen Thi Thu, Nguyen Son Linh, Nguyen Son Tra, Vo Thanh Hai, Nguyen Thi Hoa, Vo Thanh Tuan Anh, Le Thi Vinh, Nguyen Thi Nham, Nguyen Minh Chau, Nguyen Thi Thoi, Nguyen Long Van, Tong Thi Tu and

Nguyen Thang Loi were and are nationals and residents of Vietnam at relevant times.

Plaintiffs Nguyen Van Quy and Vu Thi Loan are the parents of plaintiffs Nguyen Quang Trung and Nguyen Thi Thuy Nga, who are under the age of 18 years. Plaintiff Duong Quynh Hoa is the administratrix of the estate of her deceased child, Huynh Trung Son. Plaintiff Ho Kan Hai is the mother of plaintiff Nguyen Van Hoang, who is under the age of 18 years. Plaintiff Ho Thi Le is the administratrix of the estate of her deceased husband, Ho Xuan Bat. Plaintiff Nguyen Thi Thu is the mother of plaintiffs Nguyen Son Linh and Nguyen Son Tra, who are under the age of 18 years.

Defendants are The Dow Chemical Company, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Montsanto Company, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Montsanto Chemical Company, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Pharmacia Corporation, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Hercules Incorporated, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Occidental Chemical Corporation, a corporation incorporated under the laws of the State of New York that is registered to do business or in fact does business

in the State of New York; Ultramar Diamond Shamrock Corporation, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Maxus Energy Corporation, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Thompson Hayward Chemical Company, a corporation incorporated under the laws of the State of Missouri that is registered to do business or in fact does business in the State of New York; Harcros Chemicals Inc., a corporation incorporated under the laws of the State of Kansas that is registered to do business or in fact does business in the State of New York; Uniroyal, Inc., a corporation incorporated under the laws of the State of New Jersey that is registered to do business or in fact does business in the State of New York; Uniroyal Chemical, Inc., a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Uniroyal Chemical Holding Company, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Uniroyal Chemical Acquisition Corporation, a corporation incorporated under the laws of the State of New Jersey that is registered to do business or in fact does business in the State of New York; C.D.U. Holding, Inc., a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Diamond Shamrock Agricultural Chemicals, Inc., a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business

in the State of New York; Diamond Shamrock Chemicals, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Diamond Shamrock Chemicals Company, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Diamond Shamrock Corporation, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Diamond Shamrock Refining and Marketing Company, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Occidental Electrochemicals Corporation, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Diamond Alkali Company, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Ansul, Incorporated, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Hooker Chemical Corporation, a corporation incorporated under the laws of the State of New York that is registered to do business or in fact does business in the State of New York; Hooker Chemical Far East Corporation, a corporation incorporated under the laws of the State of New York that is registered to do business or in fact does business in the State of New York; Hooker Chemicals & Plastics Corp., a corporation incorporated under the laws of the State of New York that is registered to do business or in fact does business

in the State of New York; Hoffman-Taff Chemicals, Inc., a corporation incorporated under the laws of the State of Missouri that is registered to do business or in fact does business in the State of New York; Chemical Land Holdings, Inc., a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; T-H Agriculture & Nutrition Company, Inc., a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Thompson Chemical Corporation, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Riverdale Chemical Company, a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; Elementis Chemicals Inc., a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; United States Rubber Company, Inc., a corporation incorporated under the laws of the State of New York that is registered to do business or in fact does business in the State of New York; Syntex Agribusiness Inc., a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York; and Syntex Laboratories, Inc., a corporation incorporated under the laws of the State of Delaware that is registered to do business or in fact does business in the State of New York. Some or all of the defendants are alleged to be successors-in-interest, parent companies, subsidiaries or otherwise associated with or related in interest with those defendants which

manufactured and supplied the herbicides for use in the Vietnam War from 1961 to 1975 that allegedly caused the damage complained of.

3. Spraying Herbicides in Vietnam

It is contended that the United States in cooperation with the RVN implemented a widespread program to spray herbicides, primarily by aircraft. The stated purposes of the spraying were (1) to defoliate forests and mangroves in order to destroy the vegetative cover used by the Democratic Republic of Vietnam ("DRVN") troops and irregulars calling themselves the National Liberation Front ("NLF") for conccalment, and (2) to destroy crops to deprive the DRVN and NLF of food. The spraying is alleged by plaintiffs to have lasted from 1961 until 1975.

4. Herbicides Used

The complaint indicates that various herbicides were used for defoliation and crop destruction in Vietnam. The different types of herbicides were identified by code names referring to the color of the band around the fifty-gallon steel herbicide container used to ship the materials from the manufacturer to the government which took delivery in the United States.

Herbicides included Agent Blue (cacodylic acid), Agent White (a mixture of 80% tri-isopropanol amine salt of 2,4-dichlorophenoxyacetic acid (2,4-D) and picloram), Agent Purple (a formulation of 50% n-butyl ester of 2,4-D, 30% n-butyl ester of 2,4,5-trichlorophenoxyacetic acid (2,4,5-T) and 20% isobutyl ester of 2,4-D), Agent Green (100% n-butyl ester of 2,4,5-T), Agent Pink (60%

n-butyl ester of 2,4,5-T and 40% isobutyl ester of 2,4,5-T) and Agent Orange (50-50 mixture of the n-butyl esters of 2,4-D and 2,4,5-T). From 1962 to 1965, Agents Purple, Pink and Green were used. From 1965 to 1970, Agents Orange, White and Blue were used, and from 1970 to 1971, only Agents White and Blue were used. Agent Orange was the most extensively used herbicide.

About two-thirds of the herbicides contained 2,4,5-T. A synthetic contaminant and by-product of the manufacture of 2,4,5-T is 2,3,7,8-tetracholorodibenzo-p-dioxin (TCDD), also known as dioxin. Dioxin is a toxic chemical. A by-product of cacodylic acid, contained in Agent Blue, is arsenic, and a contaminant of picloram, contained in Agent White, is hexachlorobenzene, both of which are toxic.

Phenoxy herbicides such as Agents Orange, Purple, White, Pink and Green are chemical growth regulators that kill certain plants by inducing malfunctions in the biological growth process. Agent Orange was an effective defoliant, used in regions containing a wide variety of woody and broadleaf herbaceous plants, causing discoloration and dropping of leaves. Agent White was especially useful in killing conifers. Agent Blue was used primarily for crop destruction.

Opposition to this herbicide program by scientists and others on the ground that it violated international law and was improper because it would cause harm to persons and land was brought to the attention of the United States beginning in early 1961. The United States officially ended its aircraft herbicide spraying campaign--also referred to as Operation Ranch Hand--in Vietnam in 1971. The complaint contends that unused

United States stores of herbicides were provided to and used by the RVN up until its collapse in 1975. Am. Compl., Sept. 10, 2004, at 20.

During the course of United States' use of herbicides in Vietnam, Vietnamese combatants and civilians were directly exposed to herbicides by spraying. In addition to those who were sprayed directly with herbicides, others were exposed indirectly, by coming into contact with contaminated soil, plants, food and water. It has been estimated by plaintiffs that up to four million Vietnamese were exposed to herbicides during the period 1961-1975. Extensive environmental damage with serious ecological effects also allegedly resulted from the herbicide campaign, such as destruction of mangrove forests in southern Vietnam. Residues from herbicides transported, loaded and stored at or near United States bases in Vietnam allegedly led to continuing contamination up to the present of the soil and food chains in the surrounding areas, resulting in civilians' current exposure to herbicides.

5. Supply of Herbicides by Defendants

In the early 1960s, the United States government, pursuant to the Defense Production Act of 1950, entered into a series of fixed-price production or procurement contracts with the defendants. The contracts instructed the defendants not to label the contents of the fifty-gallon herbicide containers except by a color-coded three-inch band, in accordance with the type of herbicide (e. g., orange, purple, etc.). The government bought as much of Agent Orange as defendants were able to produce.

For the purpose of this phase of the case, it can be assumed that all defendants were aware at the time of procurement and production that the herbicides would be sprayed widely in Vietnam pursuant to chemical warfare operations in the form of defoliation and crop destruction; and that they did not object to the intended use of their product. Defendants were aware at the time of procurement and production that dioxin was a by-product and contaminant of 2,4,5-T and that dioxin was toxic to plants, some animals, and possibly humans. The defendants were also aware, it can be assumed, that the herbicides were sprayed in Vietnam in concentrations greater than those recommended for civilian use and without the precautions recommended for civilian use in the United States. It is contended that the defendants were engaged in a conspiracy with the United States in violation of international law to manufacture, sell and supply these toxic herbicides to the United States government for use as chemical weapons in Vietnam during the period of 1961-1975.

6. Harm to Plaintiffs

The summary of the harms allegedly caused to plaintiffs or their progeny is set forth by plaintiffs in brief anecdotal form. The fact that diseases were experienced by some people *after* spraying does not suffice to prove general or specific causation, i.e., that the harm resulted to individuals *because* of the spraying. *Post hoc ergo propter hoc* remains a logical fallacy unacceptable in toxic tort law. Proof of causal connection depends primarily upon substantial epidemiological and other scientific data, particularly since some four million Vietnamese are claimed to have been adversely affected. Anecdotal evidence of the kind

charged in the complaint and set out below can not suffice to prove cause and effect.

Availability of necessary scientific information from Vietnamese studies needed for epidemiological analysis has not been furnished to the court. It is not available with the richness of demographic and other data published in the United States. *But see* Margaret A. Berger, *Science for Judges IV Introduction*, 13 Brook. J.L. & Pol'y 499, 500 (2005) ("Perhaps somewhat surprisingly, however, the Stellmans tell us that meaningful epidemiologic research on these veterans has never been conducted..."); Jeanne Mager Stellman & Steven D. Stellman, *Characterization of Exposure to Agent Orange in Vietnam Veterans as a Basis for Epidemiological Studies*, 13 Brook. J.L. & Pol'y 505, 506 (2005) ("Today, more than three decades after this massive environmental exposure, there is still a dearth of epidemiological data on the extent to which adverse health consequences resulted from the use, storage, and disposal of the herbicides in Vietnam."); *id.* at 506 ("The degree to which these other studies correctly estimate health effects in Vietnam veterans is not known. Thus there continue to be practical ramifications to the paucity of definitive epidemiological studies on a sufficiently large exposed population of either veterans or Vietnamese citizens."). An agreement between the United States and Vietnam provides for some joint efforts to collect relevant data. Memorandum of Understanding, Mar. 10, 2002, between Vietnam and United States, http://www.niehs.nih.gov/external/usvcrp/mou31002.pdf . In view of the decision on the law in this memorandum there is no need to pursue this issue at this time. The matter is well summed up in the latest published study

of Professor Stellman and her colleagues. It reads in part:

> The Vietnam War ended in 1975, yet no large-scale epidemiological study of herbicides and the health of either the Vietnamese population or war veterans has been carried out. . . .
>
> . . . .
>
> Large numbers of Vietnamese civilians appear to have been directly exposed to herbicidal agents, some of which were sprayed at levels at least an order of magnitude greater than for similar US domestic purposes.

Stellman, *supra*, at 686 (footnotes omitted); *see also* David Cyranoski, *U.S. and Vietnam Join Forces to Count Cost of Agent Orange*, 416 NATURE 262 (2002).

The harms allegedly suffered by plaintiffs are described in the complaint as follows:

From April 1966 through July 1971, plaintiff Dr. Phan Thi Phi Phi served as director of a multi-unit mobile hospital stationed at various locations in the provinces of Quang Nam and Quang Ngai in southern Vietnam, which were heavily sprayed with herbicides. She, along with the hospital staff and patients, ingested food and water from areas that were heavily sprayed with herbicides manufactured by the defendants. Allegedly as a result of her exposure to contaminated food and water, she had four pregnancies that ended in miscarriages.

From April 1972 until the end of Vietnam War in 1975, plaintiff Nguyen Van Quy served in the DRVN army repairing communication lines at various southern Vietnam locations. He ingested food and water from areas that had been sprayed with herbicides. He periodically suffered from headaches, exhaustion and skin irritation while he was stationed in southern Vietnam; the skin irritation disappeared after he left Quang Ngai province in 1973 but the headaches and exhaustion continued, worsening over time. In 1983, his first wife's pregnancy ended in a stillbirth; they divorced. His spells of weakness and exhaustion worsened. His second wife, plaintiff Vu Thi Loan, gave birth to two children, plaintiffs Nguyen Quang Trung and Nguyen Thi Thuy Nga, who were born developmentally disabled. In October 2003, Nguyen Van Quy was diagnosed with stomach cancer and liver damage and found to have fluid in the lung. It is alleged that these diseases, conditions and birth defects were caused by his exposure to defendants' herbicides during the Vietnam War.

From 1964 to 1968, plaintiff Dr. Duong Quynh Hoa often traveled to the cities of Bien Hoa and Song Be, which became heavily contaminated with herbicides manufactured by the defendants. From 1968 to 1976, she resided in Tay Ninh province, where she was told several times to cover her head with plastic bags because U.S. aircraft were spraying chemicals. In 1970, she gave birth to a son, Huynh Trung Son. He was born developmentally disabled and suffered from epileptic convulsions; he died from a convulsion at the age of eight months. She had two miscarriages, in July 1971 and January 1972. She was diagnosed with diabetes in 1985 and breast cancer, for which she underwent a

mastectomy, in 1998. In 1999, a test revealed relatively high levels of dioxin in her blood. She attributes all these problems to exposure to herbicides manufactured by defendants.

Since 1972, plaintiff Ho Kan Hai, a farmer, has resided in Aluoi (formerly Ashau) Valley in southern Vietnam, near the United States military base in A So where herbicides manufactured and supplied by the defendants were stored, transferred, spilled and sprayed. Her family's diet included local rice, vegetables, manioc, fish and poultry. She had four miscarriages and two of her children died at the age of 16 days and two years, respectively. She also had ovarian tumors which were surgically removed. One of her living children, Nguyen Van Hoang, was born in 1992 with severe physical and mental developmental disabilities. It is alleged that the miscarriages, ovarian tumors and developmental disabilities were caused by ingestion of food and water contaminated by herbicides manufactured by the defendants.

During the Vietnam War, plaintiff Ho Xuan Bat, now deceased, was active with the NLF in Aluoi Valley and observed the spraying of herbicides on several occasions. Herbicides were stored, transferred and spilled at several military bases in the Aluoi Valley region. In 1978, he married plaintiff Ho Thi Le and they continued to live in Aluoi Valley. They cultivated rice and vegetables for their own consumption and to sell in the local market, and consumed wild vegetables, fish and poultry. In 1980, Ho Thi Li gave birth to their first child, who died from a nose infection in 1982. She then had a miscarriage. In 1982, she gave birth to their second child, who died for unknown reasons after 16

days. Ho Xuan Bat's health began to deteriorate: he experienced fatigue, headaches, coughing with blood, chest pain, loss of appetite and weight, fever, and other symptoms. In 2003, he was diagnosed with lung cancer and died from it a year later. Ho Thi Le attributes her miscarriage, the deaths of her two children and her husband's death from lung cancer to their ingestion of food and water contaminated by herbicides manufactured by the defendants.

From 1970 through 1975, plaintiff Nguyen Dinh Thanh served in the RVN army, and was stationed in the Aluoi Valley in southern Vietnam. In 1983, his wife gave birth to their son, Nguyen Muoi, who at some point began to periodically experience severe pain in his mid-section and back. In July 2003, Nguyen Muoi was diagnosed with spina bifida, which was allegedly caused by his father's exposure to herbicides and ingestion of food and water contaminated by herbicides manufactured by defendants.

In 1965, plaintiff Dang Thi Hong Nhut traveled to Cu Chi, an area heavily sprayed with herbicides, and spent approximately one month there visiting her husband. She often noticed a fog or mist and a strong odor in the air, and a white substance on plant leaves. During her time in Cui Chi, she ate wild vegetables, poultry and fish, and drank stream water; she experienced skin rashes. In 1966, she was arrested by the RVN regime and imprisoned in Bien Hoa until 1972. After her release, she lived in areas that had been heavily sprayed with herbicides. She had given birth to a healthy son in 1960 but then had three miscarriages between 1974 and 1980 and terminated a pregnancy in 1977 after an ultrasound examination showed that the

fetus had spina bifida and other deformities. She had an intestinal tumor removed in 2002 and a non-functioning thyroid removed in 2003. She alleges that her miscarriages and other health problems were caused by her exposure to herbicides and her ingestion of food and water contaminated by herbicides manufactured by defendants.

From 1973 to 1975, plaintiff Nguyen Thi Thu repaired roads in Nam Dong in southern Vietnam, which was heavily sprayed with herbicides. From 1970 to 1975, her husband was stationed with the DRVN army in Quang Tri, which was heavily sprayed with herbicides. During this period, each consumed wild vegetables and fish and drank stream water. She has had five pregnancies, one resulting in a miscarriage and two resulting in the births of plaintiffs Nguyen Son Linh and Nguyen Son Tra, who were born with congenital birth defects and are paralyzed from the waist down. Her miscarriages and her sons' birth defects were allegedly caused by her and her husband's ingestion of food and water contaminated by herbicides manufactured by defendants.

From 1978 until 1993, plaintiff Vo Thanh Hai served in the Vietnamese army in Nam Dong, an area defoliated by herbicides. He and his family resided in Nam Dong where they cultivated rice and vegetables for their own consumption. His wife, plaintiff Nguyen Thi Hoa, miscarried in 1986. She gave birth to their son, plaintiff Vo Thanh Tuan Anh, in 1987. In 2001, Vo Thanh Tuan Anh began experiencing fatigue and dizzy spells; he was diagnosed with osteosarcoma and treated with surgery, radiotherapy and chemotherapy. Vo Thanh Hai was diagnosed with Hodgkins Disease. Both father

and son experience chronic fatigue and have difficulty performing routine activities requiring physical exertion. Their diseases were allegedly caused by their exposure to herbicides and their ingestion of food and water contaminated by herbicides manufactured by defendants.

From 1969 to 1973, plaintiff Le Thi Vinh repaired roads in Quang Tri, which was heavily sprayed with herbicides. She often saw mist in the air, ate wild vegetables and drank stream water. After the war, she began to experience fatigue, joint pain and swollen glands and suffered two miscarriages; she had to stop working in 1986. In 2002, she was diagnosed with lung cancer, which persists even though several tumors were removed. She suffers from chest pain, breathing difficulty and fluid in the lungs. Her cancer and miscarriages were allegedly caused by her exposure to herbicides and her ingestion of food and water contaminated by herbicides manufactured by defendants.

In 1989, plaintiff Nguyen Thi Nham, her husband and her son, plaintiff Nguyen Minh Chau, moved to Bien Hoa in southern Vietnam. Bien Hoa had been exposed to herbicides due to spraying, storage, transfer and spillage of herbicides at a United States military air base in the city. They regularly cultivated vegetables and poultry for their own consumption and regularly ate fish and rice purchased from the local market. Nguyen Thi Nham's first baby was born prematurely and died after one month, her second was born with defective intestines and died after ten days, and her third, Nguyen Minh Chau, was born in 1981 and suffers from chloracne. In 1999 tests revealed abnormally high

levels of dioxin in the blood of Nguyen Thi Nham and Nguyen Minh Chau. In 2003, Nguyen Thi Nham began to experience serious headaches and fatigue. She was diagnosed with diabetes. It is alleged that their diseases and the deaths of the other children were caused by their ingestion of food and water contaminated by herbicides manufactured by defendants.

In 1966, plaintiff Nguyen Thi Thoi and her husband moved to Bien Hoa, which was exposed to herbicides due to spraying, storage, transfer, and spillage at a local United States military air base. They regularly cultivated and ate local vegetables, poultry, fish and rice. In 1967, she gave birth to her first child, who died at the age of three after high fever and convulsions. She subsequently had a miscarriage. She suffers from frequent headaches, fatigue and joint pain. In 2000, a test revealed that she had an abnormally high level of dioxin in her blood. She alleges that her condition, miscarriage and the death of her child were caused by her ingestion of food and water contaminated by herbicides manufactured by defendants.

From 1961 and throughout the war, plaintiffs Dr. Nguyen Long Van and Tong Thi Tu, his wife, each served as medics with the NLF, mostly in areas which were heavily sprayed with herbicides. Dr. Nguyen Long Van was allegedly sprayed directly with herbicides on at least ten occasions. Both ate wild vegetables, rice, manioc and poultry and drank stream water exposed to herbicides. Tong Thi Tu gave birth to a healthy daughter in each of 1966 and 1974. She also gave birth in 1967 to a son who died from a lung infection after one day, in 1968 to a son with a deformed

head who died after a few hours, in 1969 to a son with urinary system complications who died after one day and in 1970 to plaintiff Nguyen Thang Loi, who was born with deformed feet, is developmentally disabled and is dependent on his parents. She was diagnosed with diabetes in 1997. Dr. Nguyen Long Van was diagnosed with a prostate tumor in 2002 and diabetes in 2003. Alleged is that their diseases, their children's deaths and their sons' birth defects were caused by their exposure to herbicides manufactured by defendants.

7. Legal Basis for Claims

It is alleged that defendants' actions have violated, and plaintiffs' causes of action arise from, the following laws, treaties, conventions and resolutions, which constitute specific examples of the applicable law of nations or customary international law, as well as from domestic national and state laws:

a. Alien Tort Statute ("ATS"), 28 U.S.C. § 1350b. Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note;

b. War Crimes Act, 18 U.S.C. § 2441d. 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare;

e. Article 23 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed October 18, 1907;

f. Geneva Convention relative to Protection of Civilian Persons in Time of War, signed at Geneva on August 12, 1949;

g. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal at Nuremberg, signed and entered into force on August 8, 1945;

h. United Nations Charter, signed at San Francisco on June 26, 1945, and entered into force on October 24, 1945;

i. United Nations General Assembly Resolution No. 2603-A (1969);

j. Customary international law;

k. Common law of the United States of America;

l. Laws of Victnam;

m. Common law of the State of New York, including but not limited to product liability, assault and battery, negligence, recklessness, intentional infliction of emotional distress, negligent infliction of emotional distress, civil conspiracy, unjust enrichment and public nuisance.

Class certification is sought. In view of the dismissal of

all individual claims, there is no reason to consider the motion for class certification.

8. Theories

a. War Crimes

It is contended that the acts of defendants adversely affecting plaintiffs constitute violations of the laws and customs of war, also known as war crimes, which prohibit: the employment of poison or poisoned weapons or other weapons calculated to cause superfluous injury or unnecessary suffering; the wanton destruction of cities, towns, villages or the natural environment, or devastation not justified by military necessity; the use of biological or chemical agents of warfare, whether gaseous, liquid or solid, employed because of their direct toxic effects on people, animals or plants; and the poisoning of food and water supplies in the course of war. Leaders, organizers, facilitators, conspirators and accomplices participating in the formulation and execution of these acts are claimed to be responsible for all acts performed by any person in the execution of this plan. The acts described allegedly constitute war crimes in violation of the ATS, TVPA, customary international law, the common law of the United States, the common law of the State of New York, the laws of Vietnam, and international treaties, agreements, conventions and resolutions.

b. Genocide

It is contended that the acts against plaintiffs constitute genocide, in violation of customary international law which prohibits the following acts

committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; or imposing measures intended to prevent births within the group. Leaders, organizers, facilitators, conspirators and accomplices participating in the formulation and execution of these acts are claimed to be responsible for all acts performed by any person in execution of such plan.

c. Crimes Against Humanity

It is contended that the acts against plaintiffs constitute crimes against humanity in violation of customary international law, which prohibits inhumane acts of a very serious nature such as willful killing and torture and other inhumane acts committed as part of a widespread or systematic attack against any civilian population or persecutions on political, racial or religious grounds. Leaders, organizers, facilitators, conspirators and accomplices participating in the formulation and execution of these acts are responsible for all acts performed by any person in execution of this plan.

d. Torture

It is contended that the acts constitute torture of the plaintiffs, in violation of the TVPA, treaties and customary international law, because they were placed in great fear for their lives, were caused to suffer severe physical and psychological pain and suffering,

and were subjected to extrajudicial killing, the threat of severe physical pain and suffering and the threat of imminent death. The torture of the plaintiffs was allegedly inflicted deliberately and intentionally for purposes which included punishing the victims for acts they or third persons committed or were suspected of having committed, and intimidating or coercing the victim or third persons. The torture was also claimed to have been intentionally inflicted for discriminatory reasons. Leaders, organizers, facilitators, conspirators and accomplices participating in the formulation and execution of these acts are said to be responsible for all acts performed by any person in execution of a plan to carry out these acts.

In addition to the above theories based on international law, the following claims are based on domestic tort law of the United States, Vietnam or New York.

e. Assault and Battery

Plaintiffs were allegedly placed in great fear for their lives, causing them to suffer severe physical and psychological abuse and agony because of defendants' acts which were willful, intentional, wanton, malicious and oppressive in conjunction with the acts of the United States. This allegedly constituted assault and battery, actionable under the laws of the United States, Vietnam and New York.

f. Intentional Infliction of Emotional Distress

Defendants are alleged to have committed outrageous conduct in violation of all normal standards of decency without privilege or justification, intentionally and

maliciously. This conduct allegedly constitutes the intentional infliction of emotional distress.

g. Negligent Infliction of Emotional Distress

Defendants, it is claimed, carelessly and negligently inflicted emotional distress through wanton and reckless conduct in manufacturing and supplying herbicides contaminated with dioxin for use in herbicidal warfare. As a direct result of defendants' wrongful acts, it is contended, plaintiffs and plaintiffs' immediate family members have suffered and will continue to suffer significant physical injury, pain and suffering and extreme and severe mental anguish and emotional distress. This conduct allegedly constituted the negligent infliction of emotional distress.

h. Negligence

Defendants are charged with having failed to use ordinary or reasonable care in order to avoid injury to plaintiffs. Defendants' negligence was allegedly a cause of injury, damage, loss or harm to plaintiffs and their next of kin. This constituted, according to the pleadings, negligence.

i. Wrongful Death

Now deceased Huynh Trung Son, child of plaintiff Duong Quynh Hoa, and now deceased Ho Xuan Bat, husband of plaintiff Ho Thi Le, died, it is charged, as a direct result of the defendants' acts and omissions. As a result of their deaths, plaintiffs Duong Quynh Hoa and Ho Thi Le have allegedly sustained pecuniary damage from loss of society, comfort, attention, services and

support of the decedents because of defendants' conduct. Plaintiffs Duong Quynh Hoa and Ho Thi Le seek relief on behalf of their deceased family members. These wrongful deaths are claimed to be actionable.

j. Strict Product Liability

The negligence of the defendants, their servants, employees and agents consisted, according to the complaint, in manufacturing and supplying the herbicides without making proper and sufficient tests to determine their dangers and contraindications, in that defendants knew, or in the exercise of reasonable diligence, should have known that the herbicides were unsafe and unfit for use by reason of the dangerous effects to human health and the environment, in negligently failing to adequately warn the public and the United States and RVN governments of the dangers and contraindications of the herbicides, in failing to properly inspect the herbicides, and in concealing the dangers and contraindications of the herbicides from the public and from the United States and RVN governments in order to profit from the manufacture and supply of the herbicides. It is contended that defendants are liable jointly and severally to the plaintiffs under the doctrine of strict product liability.

k. Public Nuisance

According to plaintiffs, defendants' acts and omissions constituted a public nuisance, and were injurious to the health and well-being of the plaintiffs, members of the plaintiffs' organization, members of the plaintiffs' families as well as neighbors and guests of plaintiffs

with no adequate remedy at law, entitling them to money damages and environmental remediation for public nuisance.

1. Unjust Enrichment

As a result of what is claimed to have been defendants' unjust enrichment, plaintiffs say they have been damaged in an amount to be determined upon an accounting of the profits received by defendants for the manufacture and supply of herbicides used in the Vietnam War. Interest is sought from the date of the first procurement contract.

m. Injunctive and Declaratory Relief

Plaintiffs seek both injunctive and declaratory relief to prevent future additional harm, as by cleaning up geographic areas now contaminated by residues of the sprayed herbicides.

B. Motions by Defendants

1. Motions under Rule 12(b)(6) and Rule 56

Defendants move under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint for failure to state a claim upon which relief can be granted. They also move under Rule 56 for partial summary judgment to dismiss all claims on the ground of statute of limitations. At the hearing defendants and plaintiffs agreed that the court could consider the motion under Rule 12(b)(6) as a motion for summary judgment against all the domestic law claims, but not against the international law claims. They also agreed that the

extensive record assembled by defendants and plaintiffs in the *Isaacson v. Dow Chemical Company*, *Stephenson v. Dow Chemical Company* and related cases of United States veterans could be relied upon by the court on the summary judgment motions. As already stated in *Isaacson v. Dow Chemical Company*, 304 F. Supp. 2d 404 (E.D.N.Y. 2004), *Isaacson v. Dow Chemical Company*, 344 F. Supp. 2d 873 (E.D.N.Y. 2004), and above in Part I.A., all domestic law claims by veterans were dismissed under Rule 56; the motion for dismissal under Rule 12(b)(6), expanded to Rule 56, as to the Vietnamese plaintiffs' domestic law claims is granted for the same reasons. The motion for partial summary judgment on statute of limitations grounds is denied. See *infra* Part VIII.D.

2. Law Applicable to Motions

a. Rule 56

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," and identifying which materials "it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The burden then

shifts to the nonmoving party to "'set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (quoting Rule 56(e) of the Federal Rules of Civil Procedure).

All inferences are to be drawn from the underlying facts in the light most favorable to the party opposing the summary judgment motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The mere existence of some peripheral factual disputes will not defeat an otherwise properly supported motion for summary judgment. *Anderson*, 477 U.S. at 247. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

b. Rule 12(b)(6)

A defendant may move for dismissal for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). The moving party has the burden of proving "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *see also King v. Simpson*, 189 F.3d 284, 287 (2d Cir. 1999). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). A court must accept the plaintiff's factual allegations as true and draw all

reasonable inferences in plaintiff's favor. *King*, 189 F.3d at 287.

In reviewing a Rule 12(b)(6) motion, the task of the court "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980). When material outside the complaint is presented to and not excluded by the court, the motion to dismiss will usually be treated as one for summary judgment and disposed of in accordance with Rule 56 of the Federal Rules of Civil Procedure. FED. R. CIV. P. 12(b); *see also Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). *But see infra* Part IV.B.3. "A complaint is deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint." *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) (citations omitted). A document is "integral" to the complaint if the complaint "relies heavily upon its terms and effect." *Chambers*, 282 F.3d at 153 (internal quotation marks omitted). "[A] plaintiff's *reliance* on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough." *Id.* (emphasis in original).

3. Context

In considering 12(b)(6) motions directed at the pleadings, the court should place allegations and supporting and opposing materials in context of the

total dispute. It may take judicial notice of undisputed and undisputable facts revealed in its own files. *See Leonard F. v. Israel Discount Bank*, 199 F.3d 99, 107 (2d Cir. 1999) ("In adjudicating a Rule 12(b)(6) motion, a district court must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken.") (internal quotation marks omitted)); *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir. 1995) ("We may consider all papers and exhibits appended to the complaint, as well as any matters of which judicial notice may be taken."). Much of the material considered in connection with the motion for summary judgment directed to the domestic law claims is helpful in understanding the pleadings on the international law claims. This includes the entire history of the Agent Orange litigation and such matters as the way herbicides were manufactured and used. The nature of the spraying and contents of the sprays used are based upon all available information, viewing the facts which are not disputable most favorably to plaintiffs. See discussion *supra* Part II.

A "herbicide" is an agent used to destroy or inhibit plant growth, while a "poison" is a substance that through its chemical action kills, injures or impairs an animal organism. A highly toxic herbicide may be poisonous and poisons may harm plants. Characterization as both, or as one or the other, depends upon design and degree. *Cf., e.g., Wax v. Aventis Pasteur, Inc.*, 240 F. Supp. 2d 191 (E.D.N.Y. 2002) (noting that thimerosal with mercury in a vaccine for children did not change a "vaccine" into a poison); *Jones v. Lederle Labs.*, 785 F. Supp. 1123 (E.D.N.Y.

1992) (discussing content of vaccine and granting defendant summary judgment as a matter of law); *see also* 21 C.F.R. § 165.110 (2005) (discussing limits on parts of arsenic and dioxin in bottled water); 29 C.F.R. § 1910.1018 (2005) (discussing limits on parts of arsenic in air to which employees are exposed). Regular and sustained total exposure of employees in industrial plants containing such toxic substances as dioxin or asbestos in the air is often orders of magnitude greater than that experienced in the transient exposure of other people; where an explosion in a chemical plant involves heavy doses of dioxin the huge concentrations and exposure are not comparable to that alleged in the instant case. *Cf., Mancuso v. Consol. Edison Co. of N.Y.*, 967 F. Supp. 1437, 1445 (S.D.N.Y. 1997) (pointing out that "[a] central tenet of toxicology is that the dose makes the poison") (internal quotation marks and citation omitted)); CASARETT & DOULL'S TOXICOLOGY: THE BASIC SCIENCE OF POISONS 3 (Curtis D. Klaassen et al., eds., 3d ed. 1986) (noting, as Paracelsus explained in the sixteenth century, "all substances are poisons; there is none which is not a poison. The right dose differentiates a poison and a remedy." (citations omitted)).Herbicides in Vietnam were sprayed as small droplets, not as a gas.

As already indicated in Part II, the spray applied contained on average in the order of 10 parts per million (p.p.m.) of dioxin, spread at the rate of approximately 3 gallons per acre by airplanes. Dioxin is a poison. The amount of dioxin in Agent Orange and other herbicides used that actually landed on the ground was attenuated by its collection in trees, wind dispersal and deterioration in the sunlight so that in the order of less than 10 p.p.m. can be estimated as landing

on people, fields and water. Once the herbicides landed at the ground level, it can be assumed for the purposes of this discussion, as plaintiffs contend, to have had a long half-life, the length of which is unclear. Given these circumstances it is concluded for 12(b)(6) purposes that the Agent Orange touched the ground or people in the order of approximately >/=999,990 herbicide or benign substance, and 10 dioxin.

Agent Orange and the other agents used, *see* Table I *supra* Part II, for the purposes of this 12(b)(6) motion, should be characterized as herbicides and not poisons. While their undesired effects may have caused some results analogous to those of poisons in their impact on people and land, such collateral consequences do not change the character of the substance for present purposes.

4. Different Treatment of Veteran and Vietnamese Plaintiffs

During the course of the argument the government suggested that it would be unfair to apply the government contractor's defense to the veteran plaintiffs' claims, but not to the Vietnamese plaintiffs' claims.

It may seem anomalous that because of the government contractor defense members of the United States armed forces may be theoretically entitled to fewer substantive rights than citizens of a foreign country--in this case, the Vietnamese allegedly affected by Agent Orange and other herbicides. *Cf.* U.S. Statement of Interest at 1 n.2 (stating that the analysis of the government contractor defense in *Isaacson v. Dow*

Chem. Co., 304 F. Supp. 2d 404, 424-39 (E.D.N.Y. 2004), should apply to Vietnamese plaintiffs' state law claims and that "it would be anomalous indeed if American veterans were precluded from bringing such state law claims, but aliens, including former soldiers in an enemy army, were permitted to assert such claims"). While citizens of the United States are themselves possessors of rights established through international law, the ATS applies only to a civil action by an alien. It reads in full: "The district courts shall have original jurisdiction of any civil action *by an alien* for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2000) (emphasis added); *see also infra* Part VII.

The question of whether this country can cut off litigation by its own citizens on the basis of a defense not available against foreigners raises an interesting constitutional domestic and international equal protection issue. The Nuremberg case of *United States v. Alstoetter (The Justice Case)* held that a government and its personnel and other entities working for it, could be guilty of international law violations against its own nationals. *See* 3 TRIALS OF WAR CRIMINALS 954, 973 (photo. reprint 1997) (1951) ("Acts committed by Germans against other Germans are punishable as crimes under Law No. 10 . . . ." (quoting General Telford Taylor, Chief of Counsel for the prosecution, in *United States v. Flick*)). This question need not be decided now.

It is appropriate to point out that United States nationals who served in Vietnam in our armed forces are not being deprived of the protection of United States laws. As a practical matter, our veterans'

protections are much greater than any the Vietnamese might possess: the United States has by statute arranged to compensate members of its armed forces arguably exposed to Agent Orange by providing extensive and generous administrative protections through Veterans Administration benefits. *See, e.g.*, Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 111 (codified as amended at 38 U.S.C.A. § 1116 (2002)); 38 C.F.R. § 3.309(e) (2004) (listing diseases associated with exposure to certain herbicides that are deemed to be service-related); 38 C.F.R. § 3.816 (2004) (listing diseases for which the Secretary of Veterans Affairs has established a presumption of connection with Agent Orange exposure for Vietnam veterans); *McMillan v. TOGUS Reg'l Office, Dep't of Veteran Affairs*, 294 F. Supp. 2d 305 (E.D.N.Y. 2003) (describing scientific studies on links between diseases and Agent Orange exposure); National Veterans Legal Services Program, Self-Help Guide on Agent Orange, Advice for Vietnam Veterans and their Families (2000 & Supp. 2003).

Recall too that the United States veterans of the Vietnam War suing in *Stephenson v. Dow Chemical Company, Isaacson v. Dow Chemical Company* and other like cases, and their families, were entitled under the Agent Orange settlement and disbursement plan of this court to the protection of what amounted to a substantial term policy providing compensation and services to *every* veteran arguably exposed to herbicides in Vietnam who became ill. Had the *Stephenson* veteran plaintiffs become ill during the many years some 300 million dollars was being expended on behalf of the class, they would have received the same compensation as those who discovered their injury before the funds obtained in the

original Agent Orange litigation were exhausted. A plan providing protection for the lifetimes of all Vietnam veterans would have resulted in very low individual recoveries because it would have had to cover diseases that tended to increase as peer groups age. This would have enormously increased the number of claims, and attenuated even further the probability that the later diseases were caused by Agent Orange rather than by pathogens, toxic chemicals, or other factors to which both veteran and the non-veteran populations were equally exposed. *Compare In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473, 498-509 (E.D.N.Y. 1995) (discussing prediction of future claims against the trust, which covers asbestos injury claims up to 2049), *aff'd in part, vacated in part by* 78 F.3d 764 (2d Cir. 1996), *with Isaacson v. Dow Chem. Co.*, 304 F. Supp. 2d 404, 421 (E.D.N.Y. 2004) (noting that claims were paid by the settlement fund up to June 30, 1997, with a total distribution to veterans for claimed diseases of $ 196,595,085, and on behalf of their families of $ 71,306,758).

V. Position of the Government Opposing Plaintiffs' Claims

Because this case implicated restrictions on the United States' conduct of its international relations, exercise of its military powers, and capacity to procure materiel for its armed forces, the court invited the government to express its views. *See Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chem. Co.*, 327 F. Supp. 2d 198 (E.D.N.Y. 2004). The government responded to the court's suggestion. U.S. Statement of Interest; *see also* 28 U.S.C. § 517 (2000) ("The Solicitor General, or any officer of the Department of Justice, may be sent

by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.").

The extensive "Statement of Interest of the United States," dated January 12, 2005, is summed up by the government as follows:

> At bottom, this litigation seeks to challenge the means by which the United States prosecuted the Vietnam war, and ineluctably draws into issue the President's constitutional Commander in Chief authorities and invites impermissible second-guessing of the Executive's war-making decisions.
>
> . . . The Executive branch considered -- and repeatedly rejected -- the contention that the use of chemical herbicides in Vietnam constituted a violation of the laws of war. Based in part on this determination, President Kennedy himself authorized the use of herbicides, and the United States requisitioned the chemicals at issue from the defendant manufacturers. In light of this background, plaintiffs' international law claims should be dismissed for a variety of reasons.
>
> First, adjudication of plaintiffs' international law claims would require this Court to pass upon the validity of the President's decisions regarding combat tactics and weaponry, made as Commander in Chief of the United States during a time of active combat. Such judicial review

would impermissibly entrench upon the Executive's Commander in Chief authority, and run afoul of basic principles of separation of powers and the political question doctrine.

Second, plaintiffs lack a cause of action to assert the international law claims set forth in the Amended Complaint. None of the statutes or treaties relied upon by plaintiffs provide them with a cause of action. Moreover, the Amended Complaint fails to state a cognizable claim for a violation of the law of nations under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Supreme Court's recent decision in Sosa v. Alvarez-Machain, 542 U.S. 692, 159 L. Ed. 2d 718, 124 S. Ct. 2739 (2004). Because the use of herbicides in war was not unlawful -- let alone universally and specifically proscribed -- the Court should not recognize a federal common law cause of action seeking damages for such conduct.

Third, because the Executive branch considered the very questions of customary international law now before the Court, expressly determined that the conduct at issue did not violate such law, and the President himself acted based upon that determination pursuant to his constitutional authority as Commander in Chief, the President's actions displace any contrary international legal norm as a rule of decision in this case. Because these controlling executive acts preempt the application of customary international law in the domestic legal system,

> the Court should reject any claims based upon such law.
>
> Fourth, were the Court to address plaintiffs' international law claims, it should give deference to the Executive's interpretation of the relevant treaties and customary international law. The Executive branch has significant expertise in the formulation and interpretation of both treaties and customary international law, which this Court should accord the substantial deference it is traditionally afforded. That interpretation has consistently been that the United States' use of chemical herbicides in Vietnam did not violate any applicable rules of international law.
>
> Finally, even if the Court were to determine that plaintiffs have stated a cognizable claim for a violation of international law, the government contractor defense should be held applicable to those claims. All of the rationales set forth by the Supreme Court for the adoption of the defense as a matter of federal common law apply to the case at bar, and international legal principles do not foreclose its application to claims allegedly founded upon customary international law.
>
> For all of these reasons, the Court should dismiss plaintiffs' international law claims.

U.S. Statement of Interest at 1-3. These contentions are discussed at appropriate points below.

VI. Insufficiency of Plaintiffs' Domestic Law and Equitable Claims

Claims (e) assault and battery; (f) intentional infliction of emotional distress; (g) negligent infliction of emotional distress; (h) negligence; (i) wrongful death; and (j) strict product liability, are each tort claims arising from acts by defendants within the United States. They are each subject to the government contractor defense.

The government contractor defense provides that liability for design defects in military equipment cannot be imposed on a government contractor by state law if "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988). See also *infra* Part IX on non-applicability of government contractor defense to international law claims.

Defendants moved for summary judgment against all plaintiffs in the instant case on domestic law claims based upon, *inter alia*, the government contractor defense. *See* Defs.' Mem. Supp. Mot. for Summ. J. Based on the Government Contractor Defense, Nov. 2, 2004, at 5 (listing *Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chem. Co.* (No. 04-CV-400) as one of the cases moved against); Reply Mem. of Law in Supp. of Defs.' Mot. For Summ. J. Based Upon the Government Contractor Defense, Feb. 8, 2005; *supra* Part IV.B.1. That defense has been established for summary judgment purposes in part in the instant case and in whole in veterans' cases that were pending concurrently with this one. *See Isaacson v. Dow Chem.*

Co., 304 F. Supp. 2d 404 (E.D.N.Y. 2004) (granting summary judgment to defendants based on government contractor defense but staying decision pending further discovery). The Vietnamese plaintiffs, like plaintiffs from the United States, are subject to that defense; it covers all domestic state and federal substantive law claims. Claims (e) to (j) are each barred by the government contractor defense and are dismissed.

A number of claims are phrased in terms of equitable rather than legal grounds for relief. They are (k) public nuisance; (l) unjust enrichment; and (m) injunctive and declaratory relief. These claims are based on internal, domestic United States law. In their gravamen they are legal in nature even though they seek equitable relief. They are subject to the same government contractor defense as are the explicit legally based tort claims. Claims (k), (l) and (m) are dismissed.

As already noted, plaintiffs seek, among other remedies, injunctive relief compelling defendants to abate and remediate ongoing health hazards allegedly caused by the United States military's environmental contamination of the soil and food chains in vast regions of Vietnam. Such injunctive relief is wholly impracticable. Furthermore, it could compromise Vietnam's sovereignty.

Injunctive relief is granted "not as a matter of right but in the exercise of a sound judicial discretion." *Morrison v. Work*, 266 U.S. 481, 490, 69 L. Ed. 394, 45 S. Ct. 149 (1925). In the exercise of that discretion, district courts may properly refuse to grant injunctive relief that is impracticable or otherwise contrary to the public interest. *See, e.g., Weinberger v. Romero-Barcelo*, 456

U.S. 305, 312, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."); *O'Shea v. Littleton*, 414 U.S. 488, 500, 38 L. Ed. 2d 674, 94 S. Ct. 669 (1974) ("A federal court should not intervene to establish the basis for future intervention that would be . . . intrusive and unworkable.").

Requests for extraterritorial injunctions often raise serious concerns for sovereignty and enforceability which compel denial. *See generally Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956). The power to enjoin activities on foreign soil "should be exercised with great reluctance when it [would] be difficult to secure compliance . . . or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country." *Id.* (holding that Lanham Act did not apply to actions committed by foreign citizens acting under presumably valid trademarks in a foreign country); *see also McKusick v. City of Melbourne*, 96 F.3d 478, 488 (11th Cir. 1996) ("'There is not an absolute right to an injunction in a case in which it would impair or affront the sovereign powers or dignity of a state or a foreign nation.'" (quoting *Hoover v. Wagner*, 47 F.3d 845, 850 (7th Cir. 1995))).

In *Bano v. Union Carbide Corp.*, an individual and three organizations sued Union Carbide and its former president for personal injuries and property damage allegedly caused by the corporation's pollution of groundwater with toxic chemicals and by-products that were dumped, stored or abandoned at its plant in India.

The district court denied their request for an injunction to remediate soil and groundwater contamination as "infeasible and inappropriate." *Bano v. Union Carbide Corp.*, 2003 U.S. Dist. LEXIS 4097, Civ. No. 99-11329, 2003 WL 1344884, at *8 (S.D.N.Y. Mar. 18, 2003), *aff'd in part, rev'd in part by* 361 F.3d 696 (2d Cir. 2004). The court noted that the former plant site is "located over 8,000 miles away from the United States" and now is owned and controlled by the Indian State of Madhya Pradesh, and concluded that "ordering remediation . . . would be ineffectual as [defendants] have no means or authority to carry it out." *Id.* Moreover, although the Indian government apparently was willing to "cooperate with any measures imposed," the court stated that it did not wish "to direct a foreign government as to how that state should address its own environmental issues," and that it "would have no control over any remediation process ordered." *Id.*

In affirming the district court's dismissal of the remediation claim on an abuse-of-discretion standard, the Court of Appeals for the Second Circuit noted that "'the practicability of drafting and enforcing an order or judgment for an injunction is one of the factors to be considered in determining the appropriateness of injunction against tort,'" *Bano v. Union Carbide Corp.*, 361 F.3d 696, 716 (2d Cir. 2004) (quoting RESTATEMENT (SECOND) OF TORTS § 943 (1979)), and that "injunctive relief may properly be refused when it would interfere with the other nation's sovereignty," *id.*

Ordering abatement and remediation in the present case would be far more "infeasible and inappropriate" than in *Bano*. The remediation sought involves areas

far larger and indeterminate than the discrete plant site and surrounding property in *Bano*. The court would be required to oversee complex environmental studies, and make conclusive findings about contamination caused by chemicals used many decades ago in large regions of a foreign country. Enforcement would necessitate the administration of standards and procedures for the cleanup of lands over which the court has no jurisdiction. These difficulties make injunctive relief wholly impracticable. Injunctive relief is denied.

VII. Application of *Sosa v. Alvarez-Machain*

In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 159 L. Ed. 2d 718, 124 S. Ct. 2739, 2761-62 (2004), the Supreme Court cautioned that "courts should require any claim [under the ATS, 28 U.S.C. § 1350,] based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court has] recognized," such as violation of safe conduct, infringement of the rights of ambassadors, and piracy. Emphasizing its narrow view of the ATS, it declared "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Id.* at 2759.

The Court stressed "judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by" the ATS, while acknowledging "that a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision." *Id.* at 2762. It

noted that "the possible collateral consequences of making international rules privately actionable argue for judicial caution," and found "reason for a high bar to new private causes of action for violating international law" in the risk of adverse foreign policy consequences for the United States "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 2763. Stressing "great caution," it declared, "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." *Id.* at 2764. It wrote: "We are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 2765. It added: "And the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* (footnotes omitted).

Based on these standards, the *Sosa* Court categorically rejected the plaintiff's argument that a binding customary norm of international law prohibited "arbitrary" detention in a case where the plaintiff was illegally detained in Mexico for less than one day and illegally brought against his will into the United States to transfer his custody to lawful authorities for a criminal prosecution. *Id.* at 2768-69. Given the cautions of *Sosa*, plaintiffs' substantive claims must be viewed skeptically.

The government urges the court to consider *Sosa's* warning about practical consequences as an independent reason for dismissal. It declares:

> In addition to carefully cabining the Court's discretion to recognize new federal common law causes of action based on international law, *Sosa* also recognized that the "determination whether a norm is sufficiently definite to support a cause of action, should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts." 124 S. Ct. at 2766. This is a paradigmatic case in which the "practical consequences" of recognizing a cause of action counsel strongly against such a result. . . . Plaintiffs' claims are based upon a challenge to the President's decision, as Commander in Chief, to use chemical herbicides to advance the war in Vietnam. The practical consequences of recognizing such a cause of action are extraordinarily problematic for several reasons.
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> . . . .
>
> First, allowing plaintiffs' claims to proceed would interfere with the United States' ongoing bilateral relationship with Vietnam, particularly as it relates to the effect of chemical herbicides used in Vietnam. That relationship has been characterized by measured and specific agreement on various issues relating to the war and its aftermath. Allowing claims such as plaintiffs' to proceed would serve to undermine and upset that relationship by usurping the

authority to address issues relating to the use of chemical herbicides from the Executive Branch, where such authority properly resides.

The United States and Vietnam have entered into two agreements relevant to the matters here at issue. First, in 1995, the two countries entered into an Agreement Between the Government of the United States of America and the Government of the Socialist Republic of Vietnam Concerning the Settlement of Certain Property Claims ("1995 Property Agreement"). *See* 34 I.L.M. 685 (1995). The 1995 Property Agreement settled claims of nationals of both parties relating to the taking or expropriation of property, and addressed the disposition of blocked Vietnamese assets in the United States. *Id.* Notably, the 1995 Property Agreement did not address claims for war reparations by either country.

Subsequently, in 2002, the United States, represented by the Department of Health and Human Services, entered into a Memorandum of Understanding with Vietnam, represented by the Vietnamese Ministry of Science, Technology and Environment. *See* Memorandum of Understanding ("MOU"), March 10, 2002, *available at* <http://usembassy.state.gov/vietnam/wwwh020310ii.html>. The MOU addresses future cooperation and collaboration between scientists in both countries with respect to research regarding the health and environmental effects of dioxin. *Id.* The MOU was the result of years of

diplomatic negotiations with the Vietnamese regarding the use of chemical herbicides containing dioxin during the war. It reflects the full extent of the United States' willingness to engage with Vietnam on the question of chemical herbicides at this time.

Recognizing a cause of action for the international law *cum* federal common law claims asserted by plaintiffs here would serve to undermine the Executive's conduct of the Nation's foreign relations with Vietnam. As demonstrated by both the 1995 Property Agreement and the MOU, to date, the United States has not agreed to provide reparations to the Vietnamese for the use of chemical herbicides during the war. Allowing plaintiffs' claims here to proceed would circumvent and defeat this Executive branch determination, and allow the plaintiffs to achieve via litigation that which their government failed to achieve via diplomacy. It is precisely such "potential implications for the foreign relations of the United States" that "should make courts particularly wary" of recognizing causes of actions such as plaintiffs', which have the effect of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." Sosa, 124 S. Ct. at 2763. Where, as here, the precise subject matter at issue has been the subject of diplomatic negotiations, *Sosa's* cautionary notes are particularly applicable, and no federal common law cause of action should be recognized.

. . . .

A more general "practical consequence" also militates against recognizing a federal common law cause of action in the case at bar. Essentially, what plaintiffs seek is war reparations from the defendant chemical companies for the United States' conduct during the Vietnam war. They thus ask this Court to recognize a federal common law cause of action, by the United States' former enemies, against the United States' military contractors, for the United States' conduct during a war. The "practical consequences" of such a step are breathtaking, as it has the potential of opening federal courthouse doors to all of the Nation's past and future enemies. Such a step would likely have a chilling effect both on the President's exercise of his Commander in Chief powers, and on government contractors' willingness to provide the products necessary to ensure the defense of the Nation. . . . Particularly in light of the traditional rule of international law that war reparations are the subject of government-to-government negotiations, and not individual claims, recognizing such federal common law claims would be truly extraordinary.

War reparations include "'all the loss and damage to which . . . Governments and their nationals have been subjected as a consequence of the war imposed upon them." Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 275 (D.N.J. 1999), *quoting* The Versaille[s] Treaty, art. 231. *See also* Black's Law Dictionary at 1325 (8th ed.

2004) (defining reparations as "compensation for an injury or wrong, esp. for wartime damages or breach of an international obligation"). Claims based upon the United States' use of chemical herbicides as a tool of war readily fall within the scope of war reparations claims.

Yet such war reparations claims have traditionally been, and as a matter of customary international law are, the subject of government-to-government negotiations, as opposed to private lawsuits. "Under international law claims for compensation by individuals harmed by war-related activity belong exclusively to the state of which the individual is a citizen." Burger-Fischer, 65 F. Supp. 2d at 273. Thus, "like other claims for violation of an international obligation, a state's claim for a violation that caused injury to rights or interests of private persons *is a claim of the state and is under the state's control.* . . . Any reparation is, in principle, for the violation of the obligation to the state, and any payment made is to the state." Restatement (3d) Foreign Relations § 902, comment i (emphasis added); cf. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416, 156 L. Ed. 2d 376, 123 S. Ct. 2374 (2003) ("historically, wartime claims against even nominally private entities have become issues in international diplomacy").

This latter point undermines any assertion that private claims for war reparations are as widely accepted as the eighteenth century paradigms discussed in *Sosa*. To the contrary, it establishes precisely the opposite -- as a matter of

> international law war reparations claims such as plaintiffs' belong to states and not to individuals. To jettison this legal principle in order to recognize individual causes of actions for plaintiffs' claims would run counter to *Sosa's* admonition that the practical consequences of recognizing new causes of action "must" inform the Court's judgment in crafting federal common law. In sum, the determination of whether, when, and how to pay reparations for conduct of the United States' Armed Forces should stay where it has been for the past two-hundred-plus years by virtue of both the Constitution and principles of customary international law -- with the Political Branches of government. For this reason as well, the Court should not recognize any federal common law cause of action in this case.

U.S. Statement of Interest at 39-43 (footnotes omitted).

VIII. Legal Concepts

A. Standing of VAVAO

Defendants assert that The Vietnam Association for Victims of Agent Orange/Dioxin ("VAVAO") has no standing. VAVAO claims to represent a putative class of some four million Vietnamese nationals who contend they have been exposed to, and injured by, herbicides manufactured by defendants. The size of the class and its appropriateness needs no attention now since, as already pointed out above in Part IV.A.7., there will be no certification of the class.

Defendants' argument is dubious on constitutional grounds, and is inappropriate on prudential grounds. Given the situation of those claimed to have been injured--their general relative poverty and constraints during and after the war, subjugation by a non-democratic communist government and the lack of a relatively sophisticated free and aggressive bar in Vietnam capable of prosecuting mass toxic tort actions--the most practical way to vindicate plaintiffs' rights, *if* there are such rights under international law, and *if* there is jurisdiction under the ATS, would be via some association such as VAVAO. Considering the geographic scope (much of the territory of Vietnam) of the claims, the nature of the claims (complex in law and fact), the number of persons affected (millions), the difficulty of prosecution (in a foreign land with different procedures and substantive law), and the importance to this country and the world of the enforcement of international law, VAVAO's standing should be recognized. VAVAO, though apparently an *ad hoc* organization designed and organized primarily to prosecute Agent Orange claims, can be said to represent both itself and its members.

Under Article III of the Constitution, a court's power to redress injury extends only to parties who have suffered "'some threatened or actual injury'" resulting from an alleged illegal action. *Warth v. Seldin*, 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 35 L. Ed. 2d 536, 93 S. Ct. 1146 (1973)). As a prudential matter, such a litigant generally "'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties.'" *Valley Forge Christian Coll. v. Ams. United for*

Separation of Church & State, Inc., 454 U.S. 464, 474, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982) (quoting *Warth*, 422 U.S. at 499).

An association satisfies constitutional standing requirements when seeking judicial relief in its own right to redress injury to the organization itself. In limited circumstances, such as those in the instant case, an organization also may have "association standing" in a representative capacity to assert claims on behalf of its members. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977); *Warth*, 422 U.S. at 515-16. In *Hunt*, the Supreme Court constructed the framework for assessing association standing. 432 U.S. at 343. The Court explained that an association has standing in a representative capacity to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.*

VAVAO sufficiently meets all these requirements. The fact that not all members of VAVAO, which includes persons who suffered no injury such as "medical and scientific researchers and prominent people from other disciplines," would have standing to sue in their own right, does not defeat standing of the organization. *See generally N.A.A.C.P. v. Acusport Corp.*, 210 F.R.D. 446, 455-61 (E.D.N.Y. 2002) (discussing standing with citations). *Cf.* Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. CHI.

LEGAL F. 279 (discussing class action as substitute for representative actions for procedural efficiency).

The Court of Appeals for the Second Circuit analyzed these issues in *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004), a case already discussed above in Part VI. In *Bano*, an individual and three organizations sued Union Carbide and its former president, alleging personal injuries and property damage from groundwater pollution caused by the dumping, storage and abandonment of toxic chemicals and by-products at the corporation's former plant in India. *Id.* at 702-05.

Addressing the organizations' claims for money damages, the Court of Appeals for the Second Circuit affirmed the district court's determination that the organizations failed to meet *Hunt's* "association standing" requirements for pursuing the claims of their members. *Id.* at 713-16. As noted above, the third prong of the *Hunt* test for "association standing" demands that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343. The organizations' claims in *Bano* were that "individuals have suffered bodily harm and damage to real property they own." 361 F.3d at 714. The court reasoned that "necessarily, each of those individuals would have to be involved in the proof of his or her claims," and concluded that the organizations lacked "association standing" to pursue these claims. *Id.* at 714-15. Relative to the scope and nature of the claims in the instant case, those in *Bano*--arising from a single event in a limited geographic area--were relatively simple and arguably could be handled by consolidated individual claims or in an ordinary class action.

The Court of Appeals for the Second Circuit noted that it was aware of "no Supreme Court or federal court of appeals ruling that an association has standing to pursue *damages* claims on behalf of its members." *Id.* at 714 (emphasis added); *see also, e.g., Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998) (confirming the district court's refusal to grant associational standing on compensatory damages claims as "obviously correct," because individualized proof of injuries was required); *Am. Fed'n of R.R. Police, Inc. v. AMTRAK*, 832 F.2d 14, 16 (2d Cir. 1987) (dismissing association plaintiff's damages claim based on physical injury because any injury that occurred "would have been peculiar to the individual policeman").

In the instant case substantial equitable remedies of injunctive relief such as disgorgement of profits and toxic chemical clean-up of a huge land mass are sought in addition to individual damages. *See supra* Parts IV.A.8., VI.

Unlike claims for money damages, an association generally has standing on behalf of its members when its claims raise a "'pure question of law,'" *Bano*, 361 F.3d at 714 (quoting *Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287, 91 L. Ed. 2d 228, 106 S. Ct. 2523 (1986)), or seek solely a forward-looking remedy such as "'a declaration, injunction, or some other form of prospective relief,'" *id.* (quoting *Warth*, 422 U.S. at 515). In such cases, the Supreme Court has held that prudential standing is possible, because "'it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.'" *Id.* (quoting *Warth*, 422

U.S. at 515). Thus, "where the organization seeks a purely legal ruling without requesting that the federal court award individualized relief to its members, the *Hunt* test may be satisfied." *Id.; see also Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993) (allowing that an association had standing on an Equal Protection challenge to an ordinance); *Brock*, 477 U.S. at 284-88 (finding union had standing to challenge a policy directive of the United States Department of Labor because it raised a "pure question of law" that could be litigated without the participation of individual claimants); *Warth*, 422 U.S. at 515.

VAVAO raises a number of pure questions of law and seeks forward-looking relief in cleanups. It has standing to seek injunctive relief. The fact that injunctive relief is denied, *supra* Part VI, does not affect the right to seek it.

B. Right to Sue Individually

It is the government's view that plaintiffs lack a cause of action allowing them to assert their international law claims because the statutes and international materials they rely upon do not provide for a private right of action, their claims do not meet the exacting rules of *Sosa*, and no norm prohibited the use of herbicides in war or destruction of enemy crops during this country's participation in the Vietnam War. U.S. Statement of Interest at 23-36. Insofar as the government's contention is that no right of action can exist under plaintiffs' theories, it is rejected as too broad. As to particular failures of the specific claims under the

specific facts of this litigation, the position is accurate and, as indicated below in Part XI, leads to dismissal.

The right to sue under international law for violations of human rights normally devolves on states or international tribunals enforcing criminal liability. Nonetheless, international agreements or the law of the United States may permit private civil suits in a court of this country. *See* 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 703(3) ("An individual victim of a violation of a human rights agreement may pursue any remedy provided by that agreement or by other applicable international agreements."); *id.* § 907 (discussing private remedies under the law of the United States for violations of international law); *supra* Part I.B.1. on treatment of foreigners in United States courts; *infra* Part VIII.H. on choice of law. While *Sosa* limits ATS litigation, it recognizes the right of a private person to sue, depending upon the applicable international substantive law.

C. Liability of Corporations for Violation of International Law

1. Aiding and Abetting

The government and defendants argue that plaintiffs' claims are essentially that defendants were aiding and abetting, and that these claims must be dismissed because Congress has not authorized aiding and abetting liability under the ATS. U.S. Statement of Interest at 36-39; *see also Cent. Bank of Denver v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181-82, 128 L. Ed. 2d 119, 114 S. Ct. 1439 (1994)(explaining that

although "aiding and abetting is an ancient criminal law doctrine," there is no "general presumption" that a federal statute should be read as extending aiding and abetting liability to the civil context and that the doctrine permitting civil redress "has been at best uncertain in application").

While this position is applicable to any kind of defendant, here it is particularly relevant in the corporate context. But it misstates the plaintiffs' broad contention: defendants are charged in their corporate capacity with themselves violating international law under Nuremberg theories. The argument of the government is analogous to that of the defendants--that as corporations they cannot be held liable. See *infra* Part VIII.C.2.; see also *infra* Part IX regarding the inapplicability of the government contractor defense to plaintiffs' claims.

Even under an aiding and abetting theory, civil liability may be established under international law. As the Amici Brief on behalf of plaintiffs properly analyzes the matter:

> Federal courts have repeatedly confronted the question of whether the ATS encompasses the liability of private actors, including private corporations, for violations of international law. Federal courts, including those of this jurisdiction, have consistently answered the question in the affirmative. *See, Kadic v. Karadzic*, 70 F.3d [232,] 239 [(2d Cir. 1995)] (the reach of international law is not limited to []state actors); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d [289,]

321 [(S.D.N.Y. 2003)] (holding that "ATCA suits [may] proceed based on theories of conspiracy and aiding and abetting"); *Abdullahi v. Pfizer, Inc.*, 77 Fed. Appx. 48 (2d Cir. 2003); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, No. 96 Civ. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (finding that private corporations could be held liable for "joint action" with state actors); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 127-28 (E.D.N.Y. 2000) (holding that subject matter jurisdiction existed under the ATCA, where plaintiffs alleged a French bank had been complicit with the Nazi regime); *Iwanowa [v. Ford Motor Co.]*, 67 F. Supp. 2d [424,] 445 [(D.N.J. 1999)] ("No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law."); *see also Doe v. Unocal*, 395 F.3d 932, 2002 U.S. App. LEXIS 19263, [at] *35-36 (9th Cir. [Sept. 18,] 2002)[,] *vacated [by]* 395 F.3d 978, 2003 U.S. App. LEXIS 2716 [(9th Cir. Feb. 14, 2003)]; *Burnett v. Al Bar Investment & Development Corp.*, 292 F. Supp. 2d 9 (D.D.C. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002) ("United States courts have recognized that principles of accomplice liability apply under the ATCA to those who assist others in the commission of torts that violate customary international law." (citing cases)); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090-95 (S.D. Fla. 1997) (holding that subject matter jurisdiction existed in an ATCA action against a Bolivian corporation);

Carmichael v. United Technologies Corp., 835 F.2d 109, 113-114 (5th Cir. 1988) (assuming without deciding that ATCA confers jurisdiction over private [parties] who aid, abet or conspire in human rights violations). . . .

U.S. courts have repeatedly determined that the *ATS encompasses aiding and abetting liability*, in a variety of different circumstances. For example, *Presbyterian Church of the Sudan*, 244 F. Supp. 2d at 320-24, held that allegations that a Canadian oil company aided and abetted war crimes and other gross human rights violations were actionable. Similarly, the court in *Mehinovic v. Vuckovic*, 198 F. Supp. 2d [1322,] 1355-1356 [(N.D. Ga. 2002)], found a former Serb soldier liable for aiding and abetting war crimes and other human rights violations in Bosnia-Herzegovina. In *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996), the Ninth Circuit affirmed a jury instruction allowing a foreign leader to be held liable upon finding that he "directed, ordered, conspired with, or aided the military in torture, summary execution, and 'disappearance.'" Likewise, *Burnett v. Al Baraka Investment*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003), held that allegations by victims of the September 11 attacks that various entities aided and abetted the perpetrators stated a claim. In *Bowoto v. Chevron Texaco [Corp.]*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004), the court held that plaintiffs could proceed on their claims against an oil company for aiding and abetting military killings in Nigeria. Similarly, *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y.

2000), held that claims that defendant banks aided and abetted the Vichy and Nazi regimes in plundering plaintiffs' assets were actionable under the ATS. There is simply no question that the ATS provides for aiding and abetting liability.

. . . The liability of private actors, as aiders and abettors, for violations of international law was understood at the time the ATS was enacted. In a 1795 opinion issued by Attorney General Bradford specifically states that individuals would be liable under the ATS for "committing, aiding, or abetting" violations of the laws of war. *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). In that opinion, the Attorney General considered an incident involving private actors, acting in concert with, but not controlling the French naval vessels. *See id.*

Six years after the passage of the ATS, the Supreme Court in *Talbot v. [Jansen]*, 3 U.S. (3 Dall.) 133, 156, 1 L. Ed. 540, 3 Dall. 133 (1795), found that Talbot, a French citizen, who had assisted Ballard, a U.S. citizen, in unlawfully capturing a Dutch ship had acted in contravention with the law of nations and was liable for the value of the captured assets. *See also id.* at 167-68 (Iredell, J., concurring) ("It is impossible that Ballard can be guilty of a crime, and Talbot, who associated with him, in the wilful commission of it, can be wholly innocent of it."). Justice Paterson wrote that Talbot's liability sprang from his actions in aiding Ballard to arm and outfit, in cooperating with him on the high

seas, and using him as the instrument and means of capturing vessels. *Id.* at 157. In finding the defendant liable, Justice Paterson found that the defendant had surrendered his protection under international law when he supplied his accomplice's ship with guns and used him "as the instrument and means of capturing vessels." *Id.* at 156. Judge Iredell, writing in concurrence, agreed, finding Talbot to have "abetted Ballard" when he "cruised before and after, in company with him [and] put guns on board of [Ballard's] vessel." *Id.* at 167. . . . Federal case law dating back more than two hundred years . . . recognized liability for aiding and abetting violations of international law norms.

. . . .

International law clearly and specifically defines aiding and abetting liability. United States courts applying such liability under the ATS have correctly held that under international law, the actus reas of aiding and abetting consists of "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime," and that the mens rea required is the knowledge that these acts assist the commission of the offence; the accomplice need not share the principal's wrongful intent. *Mehinovic*, 198 F. Supp. 2d at 1356 (quoting *Prosecutor v. Furundzija*, Case No. IT-95-17/1/T, judgment, PP192-249 (ICTY Trial Chamber, Dec. 10, 1998), *reprinted at* 38 I.L.M. 317 (1999)); *accord Presbyterian Church of the Sudan*, 244 F. Supp. 2d at 323-24. Critically, the

> jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, upon which the *Mehinovic* and *Talisman* courts relied, was based on an exhaustive analysis of the jurisprudence of the post-World War II tribunals. *See, e.g., Furundzija* IT-95-17/1, PP195-97, 200-25, 236-49. Clearly, customary international law provides a "specific, universal and obligatory" norm against aiding and abetting that was well-established long before the Vietnam War.

Br. Amici Curiae of the Center for Constitutional Rights, Earthrights International and the International Human Rights Law Clinic at the University of Virginia School of Law, Jan. 18, 2005, at 13-17 (emphasis added) (some footnotes omitted) [hereinafter Amici Brief].

2. Corporate Culpability

Defendants argue that corporations cannot be liable under international law. There is substantial support for this position. *See generally, e.g.*, STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 16 (2d ed. 2001) ("It remains unclear . . . whether international law generally imposes criminal responsibility on groups and organizations."); *id.* at 343-45 (discussing individual accountability); Albert G. D. Levy, *Criminal Responsibility of Individuals and International Law*, 12 U. CHI. L. REV. 313, 332 (1945) ("The element of individual responsibility is extraneous to international law."); Ernst Schneeberger, *The Responsibility of the*

Individual under International Law, 35 GEO. L.J. 481, 489 (1947) ("In the last resort responsibility under international law can only be responsibility of an individual . . . ."); Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 56 (2002) ("International law permits states to allow civil claims [against individuals] for human rights violations."). But see to the contrary authorities collected in Amici Brief quoted above in Part VIII.C.1.

Defendants point out, for example, that corporate defendants cannot violate the TVPA because, by its terms, the statute imposes liability only on a human being who inflicts torture upon another human being. *See infra* Part XI.B.1. They suggest that even if there had been a binding prohibition on the wartime use of herbicides prior to 1971, when use by the United States ceased, it created no universally recognized prohibition on the manufacture and sale by private parties of herbicides intended for such use. They note that the general rule is that international legal norms impose obligations on states, not private actors. Decl. of Kenneth Howard Anderson, Jr., Nov. 2, 2004, ¶88 [hereinafter Anderson Decl.]. As a leading treatise explains:

> States are the principal subjects of international law. This means that international law is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from international law are states solely and exclusively, and international law does not

> normally impose duties or confer rights directly upon an individual human being . . . .

Id. (quoting SIR ROBERT JENNINGS & SIR ARTHUR WATTS, 1 OPPENHEIM'S INTERNATIONAL LAW 16 (9th ed. 1992)).

The defendants--all corporations--contend that plaintiffs cannot show that any international prohibition extended to corporate entities. They indicate that in the few instances in which international law imposes obligations on non-state actors, "international law does not, in the context of international criminal law or elsewhere, impose obligations or liability on juridical actors or artificial persons such as corporations." *Id.* ¶89. It is apparently true that the international criminal tribunals beginning with Nuremberg have not provided for corporate criminal responsibility. *Id.* ¶¶91-92. In determining the jurisdiction of the newly created International Criminal Court the treaty drafters (including the United States) expressly rejected attempts to include corporate liability. *Id.* ¶92.

Throughout the TVPA the term "individual" describes both those who can violate its proscriptions against torture, as well as those who can be victims of torture. Specifically, the TVPA provides that "an *individual* who . . . subjects an *individual* to torture shall . . . be liable for damages to that *individual*," Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a)(1), 106 Stat. 73, 73 (1992) (emphasis added), and it defines "torture" as "any act, directed against an *individual* . . . by which severe pain or suffering . . . is intentionally inflicted on that *individual*," *id.* § 3(b)(1) (emphasis added). Both from context and common sense only

natural persons can be the "individual" victims of acts that inflict "severe pain and suffering." *See id.* Because the TVPA uses the same term "individual" to identify offenders, the definition of "individual" within the statute appears to refer to a human being, suggesting that only natural persons can violate the Act. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101, 156 L. Ed. 2d 84, 123 S. Ct. 2148 (2003) (noting that "absent some congressional indication to the contrary, [courts] decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue"); *see also Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 381-82 (E.D. La. 1997) ("The plain meaning of the term 'individual' does not ordinarily include a corporation."), *aff'd by* 197 F.3d 161 (5th Cir. 1999).

All three of the international instruments plaintiffs rely upon that address the weapons that may be used in war follow the general rule of international law by imposing obligations only on states. The Hague Convention IV expressly provides that it does "not apply *except between Contracting Powers*," Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 2, 36 Stat. 2277, 2290 (emphasis added), and that "[a] *belligerent party* which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation," *id.* art. 3 (emphasis added). The 1925 Geneva Protocol likewise provides that the "High Contracting Parties . . . accept" the prohibition on use of bacteriological methods of warfare "and agree to be bound *as between themselves*." Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 575

(emphasis added). United Nations Resolution Number 2603-A, dealing with herbicides, relies upon the 1925 Geneva Protocol, which purports solely to bind States. *See* G.A. Res. 2603-A, U.N. GAOR, 24th Sess., 1836th plen. mtg. at 16 (1969) (claiming that "the majority of States then in existence" adhered to the 1925 Geneva Protocol, that "further States have become parties" and that "other States have declared that they will abide by its principles and objectives"). Defendants argue that, because the terms of none of these documents refers to private actors, these instruments do not establish a binding international norm prohibiting private entities from making or selling herbicides for use during war prior to 1975.

Defendants argue that plaintiffs cannot rely wholly on domestic legal concepts such as conspiracy, aiding and abetting or "state actors" to expand either the type of conduct or "the type of perpetrator," that a customary international legal prohibition reaches. Instead, plaintiffs must show that a definite and universally accepted norm of international law prohibits the act of an individual working with a government to violate an international norm, and that this independent international prohibition extends to private actors. In the instances in which international law imposes obligations on non-state actors, traditionally international law does not, in the context of international criminal law or elsewhere, impose obligations or liability on juridical actors or artificial persons such as corporations. Anderson Decl. ¶¶91-92.

Yet, despite the strength of authority supporting defendants' position, in view of the Nuremberg and post-Nuremberg trials, *see infra* Parts IX.C.-D.,

plaintiffs would have overcome this conceptual burden had international law prohibited the use of herbicides in Vietnam at the time they were used by the United States. *See* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES introductory note to pt. II, at 71 ("Individuals and corporations have some independent status as persons in international law . . . ."); *see also infra* Part XI.

Professor Anderson writes that at the Nuremberg trials, several German businessmen and industrialists were tried as individuals (who had done their work as officers and directors of companies), but "the record contains no suggestion that corporations could themselves incur criminal liability." Anderson Decl. ¶91. In fact, in the Nuremberg trials, this point of lack of corporate liability appeared to have been explicitly stated. Nevertheless, in the quotation which follows, and in other proceedings regarding Krupp and other German corporate entities, the law cannot ignore the fact that it was the corporations through which the individuals acted:

> We will now turn to the consideration of the individual responsibility of the defendants for the acts of spoilation [in various countries] . . . . It is appropriate here to mention that *the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings.* We have used the term "Farben" as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoilation were committed. But *corporations act through*

individuals and, under the conception of personal individual guilt to which previous reference has been made, the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it. Responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant's membership in the Vorstand. Conversely, one may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders or abets. But the evidence must establish action of the character we have already indicated, with knowledge of the essential elements of the crime. In some instances, individuals performing these acts are not before this Tribunal. In other instances, the record has large gaps as to where or when the policy was set. In some instances, a policy is set without clear indication that essential factual elements required to make it criminal were disclosed. Difficulties of establishing such proof due to the destruction of records or other causes does not relieve the prosecution of its burden in this respect.

One cannot condone the activities of Farben in the field of spoilation. If not actually marching with the Wehrmacht, Farben at least was not far behind. But translating the criminal responsibility to personal and individual criminal acts is another matter.

United States v. Krauch (I.G. Farben Case), 8 TRIALS OF WAR CRIMINALS 1081, 1152-53 (photo. reprint 1997) (1952) (emphasis added) (footnote omitted). Even accepting this quotation's suggestion of corporate immunity at its face value, limitations on criminal liability of corporations do not necessarily apply to civil liability of corporations. It is interesting to note that Telford Taylor in his masterful text, *The Anatomy of the Nuremberg Trials*, heads chapter 18 "The Indicted *Organizations*," which describes the German corporate organizations that were essential to execution of widespread Nazi bestiality. *See* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 501 (Little Brown & Co. 1992) (emphasis added).

It is not necessary to decide whether, if the corporations had been made parties at Nuremberg--as they surely could have been under United States criminal jurisprudence--they could have been found guilty. Farben as a corporation was not a named defendant. *See also United States v. Krupp*, 9 TRIALS OF WAR CRIMINALS 1327-1452. The *Zyklon B Case (Trial of Bruno Tesch and Two Others)* involved an individual proprietorship; corporate liability was not implicated. 1-5 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93-102; see also *infra* Part IX.C.

Limiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world. *Cf.* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §

421(2)(e) (stating, generally, that a state's exercise of jurisdiction to adjudicate with respect to "a corporation or comparable judicial person" is reasonable if it "is organized pursuant to the law of the state"). Our vital private activities are conducted primarily under corporate auspices, only corporations have the wherewithal to respond to massive toxic tort suits, and changing personnel means that those individuals who acted on behalf of the corporation and for its profit are often gone or deceased before they or the corporation can be brought to justice. While the legal effects of outsourcing to private contractors is unclear, it cannot be ignored under international or United States law. *See* Myriam Gilles, *Private Parties as Defendants in Civil Rights Litigation*, 26 CARDOZO L. REV. 1, 6 & nn.21-22, 7 (2004) (discussing use of private contractors in war).

A corporation is not immune from civil legal action based on international law. The opinion on this point of Professor Paust is compelling. Paust Op. at 3 ("Companies and corporations can have duties under international law, especially with respect to laws of war and human rights. Moreover, they have never been granted immunity under any known treaty or customary law with respect to violations of treaty-based or customary international law.").

For the purposes of the present motion the court adopts the submission of the Amici Brief on the point:

> The potential liability of corporations under the ATS has been widely recognized or assumed by federal courts. The Supreme Court acknowledged that corporations can be sued

under the ATS. *Sosa v. Alvarez-Machain,* 124 S. Ct. at 2766, n.20. The Second Circuit has considered numerous cases where plaintiffs sued a corporation under the ATCA for alleged breaches of international law. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (vacating the district court's dismissal, on the grounds of *forum non conveniens,* international comity and failure to join an indispensible party, and remanding); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (reversing dismissal on *forum non conveniens* grounds and finding personal jurisdiction over the defendant corporations); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000) (affirming dismissal of the ATS claim because the defendant corporation did not "act under color of law" simply by purchasing property from the government); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (dismissed based on *forum non conveniens*). Although none of these cases explicitly addressed the liability of corporations under the ATS, the disposition of these cases is inconsistent with the assertion that no claim under the ATS can be brought against corporations. In each of these cases, the Second Circuit acknowledged that corporations are potentially liable for violations of the law of nations that ordinarily entail individual responsibility. *See also Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988) (assuming explicitly that the ATS provided subject matter jurisdiction for a claim against a corporation).

The issue of corporate liability under the ATS was decided affirmatively in numerous district court cases. In *Presbyterian Church of the Sudan v. Talisman*, [244] F. Supp. 2d at 311-19, the court reviewed the various precedents in federal common law and before international tribunals, which support the view that a corporation could be held liable for a violation of an international legal norm. The *Talisman* court noted with approval the same conclusion analyzed by Steven R. Ratner in "Corporations and Human Rights: A Theory of Legal Responsibility," 111 *Yale L.J.* 443 (2001) and INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES (2002), available at http://www.ichrp.org/ac/excerpts/41.pdf. In *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004), the court held that sufficient evidence precluded summary judgment and permitted plaintiffs to proceed against a U.S. corporate defendant on the theory that its Nigerian subsidiary was acting as defendants' agent or that the defendant corporation aided and abetted in the human rights abuses.

Defendants present no policy reason why corporations should be uniquely exempt from tort liability under the ATS, and no court has presented one either. Concluding that corporations could be subject to liability under the ATS, the *Talisman* court stated:

> Such a result should hardly be surprising. A private corporation is a juridical person and has no *per se* immunity under U.S. domestic or international law. *See* Jordan J. Paust, Human Rights Responsibilities of Private Corporations, 35 Vand. J. Transnat'l L. 801, 803 (2002). . . . Given that private individuals are liable for violations of international law in certain circumstances, there is no logical reason why corporations should not be held liable, at least in cases of *jus cogens* violations. Indeed, while Talisman disputes the fact that corporations are capable of violating the law of nations, it provides no logical argument supporting its claim.

244 F. Supp. 2d at 318.

> In any event, even if it were not true that international law recognizes corporations as defendants, they still could be sued under the ATS. As noted above, the Supreme Court made clear that an ATS claim is a federal common law claim and it is a bedrock tenet of American law that corporations can be held liable for their torts.

Amici Brief at 24-26 (footnote omitted).

D. Statutes of Limitations

Defendants argue that the applicable statutes of limitations require dismissal. *See* Defs.' Notice of Mot. for Partial Summ. J. Based on Statutes of Limitations,

Nov. 2, 2004, at 1 [hereinafter Defs.' Notice of Mot. for Partial Summ J.]. They rely on the notice given to possible claimants by the extensive publicity in Vietnam about contentions that the United States was spraying herbicides to harm people both in the north and south of that country. *See* Exs. to Defs.' Notice of Mot. for Partial Summ. J.; *see also* Defs.' Mem. of Law in Supp. of Mot. for Partial Summ. J. Dismissing Personal Injury Claims of Individual Pls. Based on Statutes of Limitations, Nov. 2, 2004, at 19-27.

The ATS contains no statute of limitations. The contention of defendants is that the ten-year statute of limitations in the Torture Victim Protection Act, Pub. L. 102-256, § 2(c), 106 Stat. 73, 73 (1992), should be applied to all federal claims under the ATS. See *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 386 (E.D.N.Y. 2002) ("It is well-established that the ten-year statute of limitations of the [TVPA] applies to all [ATS] claims."). They also argue that analogous and applicable shorter New York State statutes should bar the state law claims. *See, e.g.*, N.Y. C.P.L.R. § 202 (McKinney 2003) (borrowing statute); N.Y. C.P.L.R. § 208 (McKinney 2003) (addressing disability due to infancy or insanity); N.Y. C.P.L.R. § 209(a) (McKinney 2003) (addressing cause of action accruing in a foreign country during war); N.Y. C.P.L.R. § 213(1) (McKinney 2003 & Supp. 2005) (specifying six-year statute of limitations generally); N.Y. C.P.L.R. § 214(4), (5) (McKinney 2003) (specifying three-year statute of limitations for property and personal injury claims, except as otherwise provided); N.Y. C.P.L.R. § 214-c (McKinney 2003) (providing statutes of limitations based on discovery of injury, notwithstanding three-year limitations period in section 214); N.Y. C.P.L.R. §

215(3) (McKinney 2003) (providing one-year statute of limitations for, *inter alia*, assault and battery); N.Y. EST. POWERS & TRUSTS § 5-4.1 (McKinney 1999 & Supp. 2005) (providing, *inter alia*, for two-year statute of limitations for wrongful death suit by personal representative). *But cf. Pickett v. Brown*, 462 U.S. 1, 16 n.15, 76 L. Ed. 2d 372, 103 S. Ct. 2199 (1983) ("Statutes of limitations generally are tolled during a child's minority."); *United States v. Kubrick*, 444 U.S. 111, 62 L. Ed. 2d 259, 100 S. Ct. 352 (1979) (holding that discovery of injury and its cause is the date from which to measure statute of limitations); *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998) (same).

If a federal substantive rights statute enacted before December 1, 1990 does not specify a statute of limitations, a court applies the statute of limitations from the forum state, unless there is a federal law which "clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more important vehicle for interstitial lawmaking." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 35, 132 L. Ed. 2d 27, 115 S. Ct. 1927 (1995) (internal quotation marks and citation omitted).

Section 1658 of title 28 of the United States Code, effective December 1, 1990, provides for time limitations on the commencement of civil actions arising under acts of Congress. It provides:

> (a) Except as otherwise provided by law, *a civil action arising under an Act of Congress enacted after the date of the enactment of this section*

> may not be commenced later than 4 years after the cause of action accrues.
>
> (b) Notwithstanding section (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—
>
> (1) 2 years after the discovery of the facts consituting the violation; or
>
> (2) 5 years after such violation.

28 U.S.C.A. § 1658 (1994 & Supp. 2004) (emphasis added); *see also Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 158 L. Ed. 2d 645, 124 S. Ct. 1836 (2004) (interpreting section 1658(a) of title 28 of the United States Code). Depending upon date of enactment, statutes such as those described below in Part XI.B. would be governed by these limitations. Treaties and other instruments of international law and non-statutory customary international law would not be. See law described *infra* Parts XI.C.-D.

Some courts that have considered the international law issue have held that the TVPA, which contains a ten-year statute of limitations period, provides the closest federal analogy to the ATS. *See, e.g., Papa v. United States*, 281 F.3d 1004, 1012-13 (9th Cir. 2002) (holding that the TVPA's ten-year limitations period is applicable to ATS claims); *Manliguez v. Joseph*, 226 F.

Supp. 2d 377, 386 (E.D.N.Y. 2002) (applying the TVPA's limitations period to ATS claims because "the TVPA is . . . both the most analogous statute and the one that best accommodates federal policies"); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 462 (D.N.J. 1999) (applying the TVPA's statute of limitations to ATS claims); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, No. 96 Civ. 8386, 2002 WL 319887, at *18-*19 (S.D.N.Y. Feb. 28, 2002) (discussing statute of limitations for the ATS and finding that the TVPA's ten-year statute of limitations is the appropriate period of limitations for ATS claims). A court has applied limitations periods provided by state law, *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1548 (N.D. Cal. 1987) (holding, albeit pre-TVPA, that the most analogous statute to the ATS is section 1983 of title 42 of the United States Code and that, since state statutes of limitations are applicable to section 1983 claims, the same limitations period is applicable to ATS claims); alternatively, a court may apply the limitations period of the foreign country where the act occurred, or the limitations period of international law, *see* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 148 (1996).

No specific statute of limitations is applicable to the claims of international law violations now at issue, with the exception of the Torture Victim Protection Act. As part of federal common law (when no specific statutory limitation is applicable), federal courts may create applicable statutes of limitations and tolling provisions as well as bases for application of laches. *See* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS

ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 143-44 (2d ed. 2001) ("It is difficult to conclude that *mandatary* non-applicability of statutes of limitations has yet entered the realm of custom. . . . International law at least *permits* states to eliminate statutes of limitations for crimes against humanity and war crimes.") (emphasis in original)).

There is good reason not to create or apply general hard and fixed rules of laches or relatively short statutes of limitation, newly minted by judicial fiat, in the developing area of international law. In many instances a foreign government, group or individuals may be involved both in the violation and in threats that make it impossible for individuals harmed to complain until there is a new administration or the plaintiff can escape to freedom in another country. In the present case the lack for many years of any recognition by the United States of the Vietnam communist government as well as embargos and limits on travel arguably made it difficult for those within Vietnam to file any claims in United States courts or to obtain assistance from United States counsel. There has been no proof yet of laches here. *Cf.* Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 286 (2005) ("Some EU member states have enacted legislation reviving causes of action . . . . In some instances, courts have upheld these statutes. In other instances, these revival statutes have been struck down. In still other states, statutes of limitations have been lengthened judicially, rather than legislatively, by tolling . . . ."). *But cf. Stogner v. California*, 539 U.S. 607, 156 L. Ed. 2d 544, 123 S. Ct. 2446 (2003)

(invalidating California statute permitting prosecution of sex-related child abuse crimes even where the prior statute of limitations has expired).

The possible issues of statutes of limitations, tolling and laches requires further factual development should the case go forward on order of the Court of Appeals for the Second Circuit. In such an inquiry the courts may consider the significance of the United States Department of the Treasury's designations of North Vietnam and South Vietnam on May 5, 1964 and April 30, 1975, respectively, as foreign countries subject to the Foreign Assets Control Regulations, 31 C.F.R. § 500 (2004); apparently they did not prevent plaintiffs from filing suits in the United States. The regulations did not by their terms prohibit or restrict filing of a personal injury lawsuit. Nor did they appear to prevent retaining of attorneys in this country to prosecute their suit. There is no indication that any plaintiff applied for a waiver to the Secretary of the Treasury. *See* 31 C.F.R. § 500.201(a) (2004) (providing that otherwise prohibited transactions involving North Vietnam or South Vietnam, or its nationals, may be specifically authorized by the Secretary of the Treasury). There is no showing that permission to retain an attorney or commence a suit would have been denied. *See Am. Airways Charters, Inc. v. Regan*, 241 U.S. App. D.C. 132, 746 F.2d 865, 868 n.3 (D.C. Cir. 1984) (noting that practice may have permitted obtaining representation without a license); *id.* at 870 (concluding that advance government approval apparently was not needed for bare representation); *id.* at 867-68 (noting licenses obtained to permit payment to counsel).

In any event, tolling for infants and for Vietnamese as prospective plaintiffs in Vietnam raise questions of law and fact that are not necessarily governed by the Foreign Assets Control Regulations of the United States; the inhibitions, if any, provided by Vietnamese conditions would also need to be considered before the issue of laches and tolling--at least in part equitable doctrines--could be decided. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 771-73 (9th Cir. 1996) (including in "extraordinary conditions" that victims suffered intimidation and fear of reprisal and thus concluding that claims were tolled until the defendant left office); *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996) (noting that equitable tolling has been applied if plaintiff was "prevented in some extraordinary way from exercising his rights" (citation and internal quotation marks omitted)).

In developing a federal statute of limitations applicable in international law cases, account should be taken of the fact that many states of the United States provide for tolling. *See Young v. United States*, 535 U.S. 43, 49, 152 L. Ed. 2d 79, 122 S. Ct. 1036 (2002) (noting that "limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute" (internal quotation marks and citations omitted)). Their terms differ. For example, the New York tolling statute on Agent Orange only covers claims of United States veterans; it does not cover the claims of Vietnamese nationals. *See, e.g.*, N.Y. C.P.L.R. § 214-b (McKinney 2003 & Supp. 2005) (providing for a renewed two-year discovery statute of limitations for actions to recover damages for injury caused by phenoxy herbicides while serving as a member of the United States armed forces in Indo-

China from January 1, 1962 through May 7, 1975); 2004 N.Y. Laws 68 (reviving and extending up to June 16, 2006 any cause of action for injury or death caused by phenoxy herbicides while serving as a member of the United States armed forces from December 22, 1961 through May 7, 1975 which is or would be barred prior to June 16, 1985 because the applicable statute of limitation had expired).

Adopted, for the purposes of this phase of the litigation, subject to reconsideration, is the position of Professor Paust that "under international law, there are no statutes of limitation with respect to war crimes and other violations of international law," Paust Op. at 12 (citations omitted)--excluding the TVPA. The principle of non-applicability of statutory limitations to certain violations of international law has been recognized in international instruments. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provides that "no statutory limitations period shall apply" to war crimes and crimes against humanity, including genocide. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, art. 1, 754 U.N.T.S. 73, 75 (entered into force Nov. 11, 1970); *see also* Rome Statute of the International Criminal Court ("Rome Statute"), July 17, 1998, arts. 5, 29, U.N. Doc. A/Conf. 183/9 (1998) (entered into force July 1, 2002) ("The crimes within the jurisdiction of the Court [(i.e., genocide, crimes against humanity, war crimes and "the crime of aggression")] shall not be subject to any statute of limitations."), http://157.150.195.4/LibertyIMS::/sidRStQP3qgcXTLsn0I/Cmd%3DXmlGetRequest%3BName%3D%2364%3B

NoUI%3D1%3BF0%3D2187%3BF1%3DEnglish%3BF2%3D38544%3BF3%3D90%3Bstyle%3DXmlPageViewer%2Exsl (last visited Mar. 6, 2005). Although the United States is not a signatory to either the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity or the Rome Statute, these instruments suggest the need to recognize a rule under customary international law that no statute of limitations should be applied to war crimes and crimes against humanity. The United States' Genocide Convention Implementation Act of 1987, 18 U.S.C.A. § 1091(e) (2000 & Supp. 2004), provides that there is no statute of limitations to indict a person who commits genocide in the form of killing members of a specified group.

Apart from the difficulties of law presented by statutes of limitations and tolling, the defendants have failed to establish with the requisite probability required by Rule 56 when plaintiffs knew, or could be deemed to have known, that they were diseased because of the spraying of herbicides supplied by defendants. They rely on articles in two Vietnam newspapers alleging Agent Orange destructive effects, but there is no showing that plaintiffs read or even had access to these papers. Plaintiffs have denied that they were aware of such publications during the period when a statute might bar their claim and that they were unaware that Agent Orange might have caused the problems of which they now complain. The defendants have not met the requirement of Rule 56. See *supra* Part IV.B.2.

E. Justiciability

Defendants' motion to dismiss on the ground that

plaintiffs' claims are non-justiciable is denied. The government's argument that plaintiffs' claims raise non-justiciable political questions is not persuasive. *See* U.S. Statement of Interest at 13-22.

Defendants broadly construe the types of controversies whose adjudication would impermissibly interfere with the conduct of foreign relations. They unsuccessfully endeavor to include the present case among them. Their position does not square with the well-accepted principle that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana,* 175 U.S. 677, 700, 44 L. Ed. 320, 20 S. Ct. 290 (1900); *see also Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 423, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964) ("It is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances . . . ."); *The Nereide,* 13 U.S. 388, 9 Cranch 388, 423, 3 L. Ed. 769 (1815) (Marshall, C.J.) ("The Court is bound by the law of nations which is a part of the law of the land"); *Filartiga v. Pena-Irala,* 630 F.2d 876, 886 (2d Cir. 1980) ("It is an ancient and a salutory feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case.").

That the case may call for an assessment of the President's actions during wartime is no reason for a court to abstain. Presidential powers are limited even in wartime. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863, 62 Ohio Law Abs. 417 (1952) (holding that the executive

order to seize steel plants during the Korean War exceeded the President's constitutional power); *cf.* Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine,* 83 AM. J. INT'L L. 814, 814 (1989) ("The unevenness of congressional oversight, the proclivity of executive foreign affairs agencies for violating the law and the traditional responsibility of the courts as the last guardians of the Constitution--all point to the propriety of an active role for the judiciary in ensuring governmental compliance with the law."). It is not a defense that the spraying of herbicides was on orders of the President: Authorization by the head of government does not provide *carte blanche* for a private defendant to harm individuals in violation of international law. *See infra* Part IX. In the Third Reich all power of the state was centered in Hitler; yet his orders did not serve as a defense at Nuremberg. Justiciability is not eliminated because of possible interference with executive power even in wartime. *Rasul v. Bush,* 542 U.S. 466, 159 L. Ed. 2d 548, 124 S. Ct. 2686, 2698-99 (2004) (holding that district court had jurisdiction over claims asserted under ATS by aliens being detained by United States government at its base in Guantanamo, Cuba); *Youngstown,* 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863, 62 Ohio Law Abs. 417.

1. Generally

A well-recognized, if not altogether clear, justiciability doctrine instructs federal courts to avoid deciding "political questions." It reflects an assumption based on our separation of powers doctrine that there is a narrow class of claims best resolved by the branches of government directly responsible to the people through the vote. Federal courts, when faced with certain

allegations of unconstitutional government conduct, are to dismiss such claims without ruling on the merits.

Experts have observed that "the political question doctrine is in a state of some confusion." LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 96 (2d ed. 1988) (quotation omitted in third edition). Others have gone further, some saying that the doctrine is useless, still others that it does not exist. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 146 (Aspen Publishers, 4th ed. 2003) (concluding that the Supreme Court criteria "seem useless in identifying what constitutes a political question"); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622 (1976) ("The 'political question' doctrine . . . is an unnecessary, deceptive packaging of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts."); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1031 (1984) ("The [political question] doctrine has always proven to be an enigma to commentators. Not only have they disagreed about its wisdom and validity . . . , but they also have differed significantly over the doctrine's scope and rationale."); Louis Michael Seidman, *This Essay is Brilliant/This Essay is Stupid: Positive and Negative Self-Reference in Constitutional Practice and Theory*, 46 UCLA L. REV. 501, 528-30 (1998) (arguing that a court cannot "decide whether there is a textually demonstrable commitment or judicially manageable standards without first taking a peek at the very merits it purports to be avoiding. In effect, the Court says that it must first decide the merits in order to avoid deciding

the merits . . . . The doctrine says that courts should not decide political questions, yet the decision whether something is a political question is itself a political question that the doctrine requires the Court to decide."); Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 306 (1996) ("During the last several decades, the Court has rarely applied the political question doctrine . . . ."); Michael E. Tigar, *Judicial Power, The "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135, 1135 (1970) ("There is, properly speaking, no such thing [as a 'political question doctrine']. Rather, there are a cluster of disparate rules and principles any of which may, in a given case, dictate a result on the merits, lead to a dismissal for want of article three jurisdiction, prevent a party from airing an issue the favorable resolution of which might terminate the litigation in his favor, or authorize a federal court in its discretion and as a matter of prudence to decline jurisdiction to hear a case or decide an issue.").

The confusion expressed in the commentary is due in part to the Supreme Court's different, and sometimes conflicting, approaches to the political question doctrine. In *Marbury v. Madison*, the Supreme Court declared:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . The subjects are political. . . . Being entrusted to the executive, the decision of

> the executive is conclusive. . . . Questions, in their nature political, or which are by the constitution and laws, submitted to the executive, can never be made in this court.

5 U.S. (1 Cranch) 137, 165-66, 170, 2 L. Ed. 60 (1803). The Court's definition of political questions in *Marbury* was narrow, including only matters in which the president had unlimited discretion; under this original formulation, a claim alleging a violation of individual rights might have afforded standing, since it would not have been deemed a political question. *See* HOWARD FINK & MARK V. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 214 (1st ed. 1984) ("But notice the effect of Marbury's classification: Standing is just the obverse of political questions. If a litigant claims that an individual right has been invaded, the lawsuit by definition does not involve a political question.").

As it evolved, the modern political question doctrine came to include questions incompatible with the *Marbury* formulation, including instances where individuals alleged the violation of specific constitutional principles and the existence of concrete injury. *See, e.g., Luther v. Borden*, 48 U.S. 1, 12 L. Ed. 581 (1849) (determining nonjusticiable a suit brought under the republican form of government clause, U.S. CONST. art IV, § 4, even though the effect was to leave people in jail who were contesting the constitutionality of their conviction).

The modern governing standard in this area was articulated in the landmark one person-one vote case of *Baker v. Carr*, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S. Ct.

691 (1962). In *Baker*, the Supreme Court held that the political question doctrine did not bar the federal courts from considering an equal protection challenge to a state's voting apportionment structure. Plaintiffs from cities contended that malapportionment of the state legislature denied them equal protection because the weight of their votes would not be equal to those of voters in rural districts. Justice Brennan, writing for the Court, narrowly limited nonjusticiable political questions to a relatively few areas where the courts could not find or apply judicially enforceable standards or to areas requiring free executive or legislative control. The six areas he pointed to were the following:

> Prominent on the surface of any case held to involve a political question is found [(1)] a textually demonstrable commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. "Unless one or more of these formulations is inextricable from the case at bar, there should be no

dismissal for non-justiciability on the ground of a political question's presence." *Id.*

Baker warned against reliance on the political question doctrine to avoid deciding controversies over which the court is assumed to have jurisdiction:

> The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and *the impossibility of resolution by any semantic cataloguing.*

Id. (emphasis added).

With respect to foreign relations, the *Baker* court wrote:

> There are sweeping statements to the effect that all questions touching foreign relations are political questions. . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Id. at 211-12.

Since *Baker*, the Court has generally refused to hold that an individual's claims of personal injury present nonjusticiable political questions. *See, e.g., United States DOC v. Montana*, 503 U.S. 442, 458, 118 L. Ed. 2d 87, 112 S. Ct. 1415 (1992) (reversing a judgment holding unconstitutional a 1941 statute prescribing method of "equal proportions" as the method to be used for determining the number of representatives to which each State was entitled, concluding that the issue was "political" only insofar as it "raised an issue of great importance to the political branches"); *United States v. Munoz-Flores*, 495 U.S. 385, 109 L. Ed. 2d 384, 110 S. Ct. 1964 (1990) (holding that a dispute under the Origination Clause, U.S. CONST. art. I, § 7, cl. 1, which mandates that all bills for raising revenue originate in the House of Representatives, did not present a nonjusticiable political question); *Davis v. Bandemer*, 478 U.S. 109, 92 L. Ed. 2d 85, 106 S. Ct. 2797 (1986) (applying *Baker* to find a legislative districting case justiciable where the political "gerrymandering" alleged involved re-drawing of state legislative districts to hamper the electoral prospects of Democratic candidates); *United States v. Nixon*, 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974) (holding that the intra-executive nature of the dispute between President Nixon and Special Prosecutor Jaworski did not give rise to a political question); *Powell v. McCormack*, 395 U.S. 486, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1969) (concluding that the political question doctrine did not bar review of the House of Representatives' exercise of the Article I, section 5, power to judge the qualifications of its members).

Only a few times since *Baker* has the Supreme Court invoked the political question doctrine to hold issues nonjusticiable. In *Gilligan v. Morgan*, 413 U.S. 1, 37 L. Ed. 2d 407, 93 S. Ct. 2440 (1973), plaintiffs sought evaluation by the federal court of the training of the Ohio National Guard under the Fourteenth Amendment of the Due Process Clause and sought injunctive relief in the event of a violation. The Supreme Court based its determination that the question was nonjusticiable on the following factors: (1) Article I, section 8 of the Constitution authorized Congress to engage in this kind of supervision; and (2) judicial review in this area would be essentially standardless. The Court reasoned that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.* at 10.

In *Goldwater v. Carter*, 444 U.S. 996, 62 L. Ed. 2d 428, 100 S. Ct. 533 (1979) (per curiam), the Court summarily vacated the decision of a court of appeals holding that the President had power to terminate a treaty with Taiwan without the approval of the Senate. The plurality postulated that the President's power to abrogate a treaty presented a political question and therefore was nonjusticiable. Justice Powell concurred in the judgment on the ground that the suit was not ripe because neither the Senate nor the House had directly challenged the issue. *Id.* at 997-98 (Powell, J., concurring). He disagreed with Justice Rehnquist's conclusion that the issue was a nonjusticiable political question, and argued to the contrary that "reliance upon the political-question doctrine is inconsistent with our precedents." *Id.* at 998.

In *Nixon v. United States*, 506 U.S. 224, 122 L. Ed. 2d 1,

113 S. Ct. 732 (1993), the Court held that a challenge by Walter L. Nixon, former Chief Judge of the United States District Court for the Southern District of Mississippi, to the Senate's use of a committee to hear testimony and gather other evidence in his impeachment trial amounted to a nonjusticiable political question. The Court's analysis centered on Article I, section 3, clause 6 of the Constitution: "The Senate shall have the sole Power to try all Impeachments." The Court determined that "the use of the . . . word 'try' lacked sufficient precision to afford any judicially manageable standard of review." 506 U.S. at 230. The Court underscored the significance of the explicit grant of "sole" authority to the legislative branch, and further observed that judicial review would pose too great a threat to the legitimacy of the process, "placing final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate." *Id.* at 235. The Court concluded that the Constitution's textually demonstrable commitment to the Senate of the conduct of impeachment trials made the issue a nonjusticiable political question.

Bush v. Gore, 531 U.S. 98, 148 L. Ed. 2d 388, 121 S. Ct. 525 (2000), is relied upon by some commentators as illustrating the lack of clarity and vitality of the political question doctrine. Commentators noted the significance of the Court's failure to even mention the doctrine. *See, e.g.*, Robert J. Pushaw, Jr., *The Presidential Election Dispute, The Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603, 612 (2001) (observing that, "interestingly, no Justice in *Bush* cited *Baker* or used the term 'political question doctrine'");

Mark Tushnet, *Law and Prudence in the Law of Justiciability*, 80 N.C. L. REV. 1203, 1229 (2002) ("What is most notable about *Bush v. Gore* in the present context is that no one said anything at all about justiciability questions.").

In *Vieth v. Jubelirer*, 541 U.S. 267, 158 L. Ed. 2d 546, 124 S. Ct. 1769 (2004), Justice Scalia's plurality opinion held that a challenge to the political gerrymandering of Pennsylvania voting districts was a nonjusticiable political question because no judicially manageable standards could be applied. The plurality reasoned that "the issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy." *Id.* at 1785. It then concluded that there were no constitutionally appropriate and judicially manageable standards for determining when "political gerrymandering has gone too far." *Id.* at 1787.

Vieth arguably demonstrated that there is still a viable political question doctrine and that, as a pre-Vieth commentator noted, "reports of [its] death . . . have been greatly exaggerated." *The Supreme Court, 1992 Term--Leading Cases*, 107 HARV. L. REV. 254, 294 (1993); see *also* David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1445-46 (1999) ("The [Court's] recent decisions have all but given the political question doctrine a quiet burial. With [one exception], the political question doctrine has played almost no role in Supreme Court jurisprudence -- and virtually none at all in the foreign affairs realm.").

Courts remain obliged to determine whether provisions may be interpreted as guarantees of enforceable rights. They must first construe the relevant text, paying close attention to whether the provision by its terms grants authority to another branch of government; if a provision recognizes such authority, the court will have to consider the possibility of conflicting conclusions, as well as whether parallel judicial and political remedies are necessary.

> But ultimately, the political question inquiry turns as much on the court's conception of judicial competence as on the constitutional text. Thus the political question doctrine, like other justiciability doctrines, at bottom reflects the mix of constitutional interpretation and judicial discretion which is an inevitable by-product of the efforts of federal courts to define their own limitations.

LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 385 (3d ed. 2000). Given the importance of international law today in preventing abuse by nations and individuals, and the importation of that law into ruling federal law, the political question doctrine does not bar this suit.

2. Application of *Baker v. Carr* to Foreign Affairs and War

The crux of defendants' strongest argument for nonjusticiability is that the Supreme Court repeatedly has cautioned against adjudicating claims that would interfere with the conduct of foreign relations and war powers. Great emphasis is also placed on the Court of

Appeals for the Second Circuit's repeated recognition of diplomatic negotiations and the conduct of foreign affairs as matters left to the President's discretion, particularly where there are hostilities.

Defendants' position is that plaintiffs' suit "challenges how the President, with the support of Congress, chose to prosecute the war in Vietnam, and seek[s] reparations that our Nation has declined to make to the people of Vietnam." Mem. of Law in Support of Defs.' Mot. to Dismiss All Claims in Pls.' Amended Class Action Compl. for Lack of Jurisdiction over the Subject Matter and for Failure to State a Claim Upon Which Relief Can Be Granted, Nov. 2, 2004, at 20 [hereinafter Defs.' Mem. of Law to Dismiss All Claims]. They contend that "virtually every one of [the Baker] factors is present," *id.* at 15, particularly in (1) demonstrating a lack of the respect due coordinate branches, the fourth *Baker* factor; (2) raising questions that uniquely demand single-voiced statements of the government's views; and (3) risking embarrassment from multifarious pronouncements, the sixth *Baker* factor. It is also suggested that adjudication would require this court impermissibly to second-guess the wisdom of core military and diplomatic decisions and might interfere with present sovereign-to-sovereign relations between the United States and Vietnam, positing that these conclusions do not change because plaintiffs have sued private citizens instead of the United States.

The defendants have failed to establish that any of the *Baker* factors are present in the instant case. As for the first *Baker* factor, there is no textually demonstrable commitment of the issues posed in the instant case to a coordinate political department. The

judiciary is the branch of government to which claims based on international law has been committed. *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) ("We have noted in a similar context . . . that 'the department to whom this issue is "constitutionally committed" is none other than our own--the Judiciary.'" (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991)). The issues now presented require interpretation of both international law, including treaties, and domestic tort law. Article III explicitly extends judicial power to the domain of treaties. U.S. CONST. art. III, § 2. As put in *Klinghoffer v. S.N.C. Achille Lauro*, the instant case can be characterized as "an ordinary tort suit, alleging that the defendants breached a duty of care owed to plaintiffs or their decedents. . . . This factor alone, then, strongly suggests that the political question doctrine does not apply." 937 F.2d 44, 49 (2d Cir. 1991).

In *Sosa v. Alvarez-Machain*, the Supreme Court observed in its thorough history of the ATS that "violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, [were] probably on the minds of the men who drafted the ATS with its reference to tort." 542 U.S. 692, 159 L. Ed. 2d 718, 124 S. Ct. 2739, 2755 (2004). It wrote:

> The Framers responded [to the increasing concern that the federal government lacked judicial powers with the competency to handle cases of international dimension] by vesting the Supreme Court with original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls[,]" U.S. Const., Art. III, §

> 2, and the First Congress followed through. The Judiciary Act reinforced this Court's original jurisdiction over suits brought by diplomats, *see* 1 Stat. 80, ch. 20, § 13, created alienage jurisdiction, § 11 and, of course, included the ATS, § 9.

Id. at 2757.

Hybrid tort and international law actions have long been addressed by the courts. *See Sosa*, 124 S. Ct. at 2759 (noting that "the 1795 opinion of Attorney General William Bradford . . . made it clear that a federal court was open for the prosecution of a tort action growing out of [an episode where Americans took part in the French plunder of a British slave colony in Sierra Leone]" and that jurisdiction was "'expressly given to these courts in all cases where an alien sues for tort only, in violation of the laws of nations, or a treaty of the United States.'" (quoting 1 Op. Atty. Gen. 57)). The history of this practice confirms that there is no textually demonstrable commitment of the issue to a coordinate political branch.

The second *Baker* factor requires a court to determine whether there are judicially discoverable and manageable standards for resolving the issue. While the answers to questions of international law, like those of domestic law, may not always be clear, they are ascertainable and manageable. As the Court of Appeals for the Second Circuit recalled:

> Our decision in *Filartiga* established that universally recognized norms of international law provide judicially discoverable and

> manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion. Moreover, the existence of judicially discoverable and manageable standards further undermines the claim that such suits relate to matters that are constitutionally committed to another branch.

Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995). Courts in the Second Circuit have repeatedly resolved international law questions in the context of claims under the ATS. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) ("Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists we conclude that official torture is now prohibited by the law of nations." (footnote omitted)); *see also Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004); *Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *In re : S. African Apartheid Litig. v. Citigroup, Inc.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *Weiss v. Am. Jewish Comm.*, 335 F. Supp. 2d 469 (S.D.N.Y. 2004).

The third*Baker* factor requires courts to evaluate whether it would be impossible to decide the case without making an initial policy determination of a kind clearly involving nonjudicial discretion. The question at issue in the instant case is whether American corporations acted in violation of international law during a war. Defendants argue that this will require an assessment of the President's conduct during a time

of war, and that courts lack the authority to ever determine whether the President, as Commander-in-Chief, has exceeded his constitutional authority. This kind of determination is one of substantive international law, not policy. A categorical rule of non-justiciability because of possible interference with executive power, even in times of war, has never existed. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863, 62 Ohio Law Abs. 417 (1952) (holding that the executive order to seize steel plants during the Korean War exceeded the President's constitutional power); *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 62 (2d ed. 1996) ("Of course the President cannot do what is forbidden to him . . . .").

"The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadic*, 70 F.3d at 249. The *Burger-Fischer v. Degussa AG* court engaged in such analysis in addressing the political question doctrine because there the extensive post-World War II treaties and reparations were found to have been designed to deal with compensation, and thus to effectively preclude private resolution of the issues:

> In effect, plaintiffs are inviting this court to try its hand at refashioning the reparations agreements which the United States and other World War II combatants (whose blood and treasure brought the war of conquest and the program of extermination to an end) forged in

> the crucible of a devastated post-war Europe and in the crucible of the Cold War. . . . This is a task which the court does not have the judicial power to perform.

65 F. Supp. 2d 248, 282 (D.N.J. 1999). In contrast to *Burger-Fischer*, the instant case does not require the refashioning of agreements by coordinate branches of government. It requires only the interpretation of international law. The agreements between the present Vietnam government and the United States cited by defendants address property that was expropriated or nationalized by Vietnam and future research--they do not address any issue raised in this case.

The fourth *Baker* factor turns on the potential impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government. The determination that a branch of government has exceeded its constitutional authority does not express lack of respect for it. If the contrary were the case, courts would be unable to declare acts of Congress unconstitutional. *See, e.g., United States v. Munoz-Flores*, 495 U.S. 385, 390-91, 109 L. Ed. 2d 384, 110 S. Ct. 1964 (1990) (rejecting government's claim that invalidation of a bill would demonstrate disrespect for Congress's judgment, noting that "congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality"). The President is no more above the law than is Congress or the courts. Treaties and other aspects of international law apply to, and limit, executive power--even in wartime. Because the Executive and the Legislature have not made significant political decisions in the area

being trod on by the instant parties, as was the case in *Burger-Fischer*, there is no unusual need for unquestioning adherence to a political decision already made, the fifth *Baker* factor.

As for the sixth and final *Baker* factor--the potentiality of embarrassment from multifarious pronouncements by various departments on one question--the absence of executive and legislative action obviates concern. The judiciary, as well as the executive and the legislature, are each charged with the interpretation and application of international law. That a decision may touch on foreign relations does not decide the question.

> While the Constitution grants to the political branches, and in particular to the Executive, responsibility for conducting the nation's foreign affairs, it does not follow that the judicial power is excluded from the resolution of cases merely because they may touch upon such affairs. The court must instead look at "the particular question posed" in the case. *Baker v. Carr*, 369 U.S. at 211, 82 S. Ct. at 707. In fact, courts are routinely deciding cases that touch upon or even have a substantial impact on foreign and defense policy.

Dellums v. Bush, 752 F. Supp. 1141, 1146 (D.C. Cir. 1990) (citing *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 92 L. Ed. 2d 166, 106 S. Ct. 2860 (1986); *Dames & Moore v. Regan*, 453 U.S. 654, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863, 62 Ohio Law Abs. 417 (1952); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 81

L. Ed. 255, 57 S. Ct. 216 (1936)). This case does not raise a nonjusticiable political question. It raises issues that courts are structured and empowered to decide--the nature and applicability of substantive international law and domestic tort law.

The amici brief states the position properly when it asserts in part:

> Just last term, the Supreme Court held that an ATS claim against the U.S. government challenging acts taken in prosecuting the war against al Qaeda and the Taliban regime was justiciable. *Rasul v. Bush*, 542 U.S. 466, 159 L. Ed. 2d 548, 124 S. Ct. [2686,] 2698 [(2004)]. . . .
>
> The *Rasul* petitioners were foreign citizens captured abroad during hostilities between the United States and the Taliban, and held by the U.S. military at the U.S. naval base at Guantanamo Bay, Cuba. The petitioners challenged the legality of their detention. Some sought to assert jurisdiction under the ATS. The Court explicitly held that a district court could hear petitioners' ATS claims. It noted that the ATS:
>
> > explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District

> Court's jurisdiction over their nonhabeas statutory claims. *Id.* at 2699.

. . . The government argued in *Rasul*, as defendants do here, that the conduct of foreign affairs is committed to the political branches, particularly with respect to the Executive's conduct of military operations abroad. Resp't Br. at 41-42, *Rasul* (No. 03-334), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/03-334/03-334.mer.resp.pdf. The government further claimed that:

> exercising jurisdiction over actions filed on behalf of the Guantanamo detainees would thrust the federal courts into the extraordinary role of reviewing the military's conduct of hostilities overseas, second-guessing the military's determination as to which captured aliens pose a threat to the United States or have strategic intelligence value, and, in practical effect, superintending the Executive's conduct of an armed conflict--even while American troops are on the ground in Afghanistan and engaged in daily combat operations. *Id.* at 43.

The Court rejected this position and, again, allowed the prisoners to challenge the legality of their detentions. Given that the petitioners in *Rasul* challenged the conduct of *ongoing* operations, defendants' argument that court review of conduct in Vietnam thirty years ago would "interfere" with a foreign policy stands on

an even weaker foundation. The Supreme Court's holding that federal courts have authority to entertain the claims in *Rasul* clearly counsels against any notion that the claims at bar are inherently non-justiciable.

Similarly in *Hamdi v. Rumsfeld*, the plurality opinion "rejected the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts" in assessing whether a U.S. citizen captured during war was properly deemed by the Executive to be an enemy combatant. *Hamdi*, 124 S. Ct. at 2650. The plurality noted that while the military does have wide discretion in waging war, "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here." *Id.* at 2649-50, *citing Sterling v. Constantin*, 287 U.S. 378, 401, 77 L. Ed. 375, 53 S. Ct. 190 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions").

United States courts have a long history of deciding damage claims for wrongful conduct committed by soldiers, commanders, or private persons during war. In *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 2 L. Ed. 243 (1804), Chief Justice Marshall spoke for a unanimous court in holding a captain in the U.S. Navy liable for damages to a ship owner for the illegal seizure of his vessel during wartime. The Court held that the

> President's orders authorizing the seizure of the ship did not immunize the captain from a lawsuit for civil damages where the President's instructions *went beyond his statutory authority. Id.* at 179. The Court held, "the [President's] instructions cannot . . . legalize an act which without those instructions would have been a plain trespass [or unlawful act]." *Id.* at 179.
>
> The Supreme Court has repeatedly permitted damage actions to be brought against individual soldiers and officers for wrongful or otherwise tortious conduct taken in the course of warfare. *See, e.g., Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 14 L. Ed. 75 (1851) (U.S. soldier sued for trespass for wrongfully seizing a citizen's goods while in Mexico during the Mexican War); *Ford v. Surget*, 97 U.S. 594, 605-06, 24 L. Ed. 1018 (1878) (reviewing soldier's civil liability for trespass and destruction of cotton and evaluating in accordance with the usages of civilized and lawful warfare); *Freeland v. Williams*, 131 U.S. 405, 417, 33 L. Ed. 193, 9 S. Ct. 763 (1889); *see also* 54 Am. Jur. 2d. *Military and Civil Defense* § 293 (1971); W. Winthrop, *Military Law & Precedents* 780 n. 31, 887-89 (2d ed[.] 1920).

Amici Brief at 13-17 (footnote moved to text).

Defendants cite *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 92 L. Ed. 2d 166, 106 S. Ct. 2860 (1986), in support of the argument that respect for fundamental separation of powers excludes the issues plaintiffs present from judicial review. The language of *Japan Whaling* excludes from review only "those

controversies which revolve around policy choices and value determinations *constitutionally committed* for resolution to the halls of Congress or the confines of the Executive Branch." *Id.* at 230 (emphasis added). In *Japan Whaling*, the petitioners argued that the actions before the Court were unsuitable for judicial review because they involved foreign relations, and that in essence federal courts lacked the power to command the Secretary of Commerce, an Executive Branch official, to dishonor and repudiate an international treaty. The Court disagreed with the argument that the case raised a nonjusticiable political question, noting that, "*Baker* [itself] carefully pointed out that not every matter touching on politics is a political question." *Id.* at 229. It observed:

> As *Baker* plainly held . . . the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. . . . We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones. We conclude, therefore, that the present cases present a justiciable controversy, and turn to the merits of petitioners' arguments.

Id. at 230 (footnote omitted).

Defendants do not explain how an ATS action, or any action involving international law, could be brought in a way that would not offend their inflated understanding of the political question doctrine. It is well established that,

> suits of this nature can present difficulties that implicate sensitive matters of diplomacy historically reserved to the jurisdiction of the political branches. . . .
>
> . . . Although we too recognize the potentially detrimental effects of judicial action in cases of this nature, we do not embrace the rather categorical views as to the inappropriateness of judicial action urged by [some other jurists]. Not every case "touching foreign relations" is nonjusticiable, and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign affairs. . . .
>
> . . . Although these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions.

Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) (citations omitted). *Sosa v. Alvarez-Machain* did not rely upon the political question doctrine; it stated that,

> it would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.
>
> . . . .
>
> While we . . . would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely.

124 S. Ct. at 2765.

Were the defendants' position accepted, it is difficult to imagine how the law of nations could be enforced in our courts at any time in any controversy. Yet, as Professor Louis Henkin put the matter: "Treaties are the law of the land. Cases arising under treaties are justiciable." Louis Henkin, *Lexical Priority or 'Political Question': A Response*, 101 HARV. L. REV. 524, 531 (1987). What international law is and how it applies present questions of the meaning of substantive law, and the interpretation of these questions is a task entrusted to the courts. That judicial power can not be frustrated by the overly broad preemption doctrine espoused by defendants.

The Court of Appeals of the Second Circuit's opinions cited by defendants do not stand for the broad

proposition that Congress and the Executive are entitled to unswerving deference when it comes to national defense matters and military affairs. Defendants' mention of governing Second Circuit Court of Appeals ATS caselaw is of limited utility since defendants attempt to prove that the instant case involves "reparations" by the United States. Defs.' Mem. of Law to Dismiss All Claims at 20 n.37 ("During a recent conference with the parties, this Court raised the potential applicability of *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), to plaintiff's claims. Plaintiffs' claims, however, are fundamentally different from those found to be justiciable in *Kadic*. . . . The plaintiffs in *Kadic* did not seek reparations for the United States' conduct in war."). The argument is misconceived; this is not a case for reparations, but a tort suit between private parties.

The *Kadic* court cited *Filartiga v. Pena-Irala*, another leading ATS case supporting justiciability. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980) ("As part of an articulated scheme of federal control over external affairs, Congress provided, in the first Judiciary Act, for federal jurisdiction over suits by aliens where principles of international law are in issue. The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law." (citation omitted)). The Supreme Court also cited *Filartiga* in *Sosa:*

> The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) . . . Congress, however, has not only expressed no disagreement with our view of the proper

> exercise of judicial power, but has responded . . . by enacting legislation supplementing the judicial determination in some detail.

124 S. Ct. at 2765.

Cases of the Court of Appeals for the Second Circuit cited for the proposition that the executive and the legislative branches are entitled to deference in military decisions do not rebut ATS holdings that are more clearly on point. *Compare Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (refusing to halt hostilities in Southeast Asia that had been implicitly approved by Congress), *with Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (holding that a claim alleging violations of customary international law and the law of war for purposes of the ATS was not precluded by the political question doctrine). *See also* ELIZABETH HOLTZMAN & CYNTHIA COOPER, WHO SAID IT WOULD BE EASY, ONE WOMAN'S LIFE IN THE POLITICAL ARENA 70-76 (1996) (discussing the background of the Cambodian War suit); *cf.* John Files, *U.S. Settles Suit in 1945 Looting of Jews by G.I.'s*, N.Y. TIMES, Dec. 21, 2004, at A8 (discussing assets stolen by Nazis from Hungarian Jews sent to concentration camps).

Defendants frame much of their argument as though the relief sought by plaintiffs were a request for war reparations, citing various decisions involving Nazi-era claims, including *Alperin v. Vatican Bank*, 242 F. Supp. 2d 686 (N.D. Cal. 2003), *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659 (N.D. Cal. 2002), *Frumkin v. JA Jones, Inc. (In re Nazi Era Cases Against German Defendants Litig.)*, 129 F. Supp. 2d 370, 383-84 (D.N.J.

2001), *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999), and *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999).

Burger-Fischer, the first case decided in this line, provided the rationale for much of the analysis of the cases that followed. Class actions were brought against German corporations to recover, *inter alia*, compensation for slave labor under the Nazi regime as well as damages for oppressive living and working conditions. The court reasoned:

> It is not accurate to characterize the present actions as simply controversies between private parties. The actions against Degussa and Siemens are but four of the many slave labor cases being brought in the courts of the United States against a host of major German corporate entities. . . .
>
> Viewed in their entirety these cases are hardly the typical individual against individual cases posited . . . .

65 F. Supp. 2d at 281-82. The court's opinion included a thorough history of the agreements following World War II, including a discussion of the Potsdam Conference, the Paris Agreement, the Transition Agreement, the London Debt Agreement, and the 2+4 Treaty. The court concluded:

> From the outset negotiations concerning reparation claims, both with the western and eastern bloc nations, included within the term "reparations" claims of individuals both against

> the German state and against German nationals. . . . An examination of the applicable treaties establishes that the international community has subsumed [wartime claims against private corporations] and agreed that the remedies, if any, lie in German legislation and the bilateral agreements that flowed from the Transition Agreement.
>
> . . .
>
> To state the ultimate conclusion, the questions whether the reparation agreements made adequate provision for the victims of Nazi oppression and whether Germany has adequately implemented the reparation agreements are political questions which a court must decline to determine. Accepting that the court has jurisdiction over the subject matter of this case and assuming that it has jurisdiction over the parties it must nevertheless refrain from adjudicating the dispute.

Id. at 279, 282.

Subsequent to *Burger-Fischer*, one court noted a significant development: the German Parliament's July 2000 passage of a law creating the Foundation "Remembrance, Responsibility and the Future." *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 379 (D.N.J. 2001). The Foundation was established to make payments to individual Nazi-era victims for claims against German industry. *See* Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-

F.R.G., 39 I.L.M. 1298. The court determined that "the Executive Agreement is a pronouncement by our government that claims against German Industry should not be litigated, but instead should be submitted to the Foundation." *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d at 383. It held that the case presented a nonjusticiable political question because, "if this Court were to decline to dismiss . . . it would impermissibly intrude into an area that has been exclusively managed by the Executive and Legislative branches for the last fifty-five years." *Id.* at 383; *see also Ukrainian Nat'l Ass'n of Jewish Former Prisoners of Concentration Camps & Ghettos v. United States*, 178 F. Supp. 2d 312 (E.D.N.Y. 2001) (granting plaintiff's motion to withdraw complaint in action by trustee of foundation seeking compensation for victims of Nazi Germany).

Burger-Fischer and the cases that followed it interpreted specific treaties and reparations agreements put in place after World War II to preclude independent private resolution. The extensive treaties and agreements analyzed in *Burger-Fischer* present a factual picture quite unlike this one, in which general international human rights law controls. A quotation from this line of cases is instructive:

> The executive branch has always addressed claims for reparations as claims between governments. Historically, at the end of a war, there has always been a declaration of victorious nations and defeated nations. As part of that process, the victorious nations invariably discuss the reparations that the defeated nations must pay to compensate the prevailing countries and

> their nationals for the loss that the aggressor has caused. The nature of war is such that the governments of the victorious nations determine and negotiate the resolution of the claims of their nationals by way of agreements between the nations involved or affected by the war. This is evident from the reparations provisions in the Treaty of Versailles following World War I, and the discussion of reparations in the Yalta Conference, the Potsdam Conference and the Paris Reparations Treaty at the end of World War II. More recently, at the end of the Gulf War, the United Nations established an international claims resolution tribunal to resolve claims against Iraq. Thus, it is evident that responsibility for resolving forced labor claims arising out of a war is constitutionally committed to the political branches of government, not the judiciary.

Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 485 (D.N.J. 1999) (citations omitted).

A significant distinguishing feature of the Vietnam War is the absence of Executive and Legislative decisions regarding reparations following termination of hostilities, in stark contrast to the large number of such decisions following World War II. Because the extensive post-World War II treaties and agreements are in no way akin to the coordinate branches' relative silence following Vietnam, the potential for impermissibly intruding into foreign relations posed by the former is not present in the latter.

It is also worth noting that while the *Burger-Fischer*

court's reasoning was thoughtful, the outcome was not inevitable. The case could have gone the other way on the theory that the plaintiffs directly sued the defendants who had personally profited by, in effect, stealing their labor services and property. A major motive of many of those who conducted the Holocaust can be characterized for purposes of justiciability as common individual robbery and thuggery punishable by both tort and criminal law of most nations. *See, e.g.*, ROBERT E. CONOT, JUSTICE AT NUREMBERG 76 (1983) ("As soon as the victorious Wehrmacht swept across Europe, Alfried [Krupp] joined with other German industrialists in the rush to acquire the spoils, consisting mostly of expropriated Jewish property. When one French entrepreneur, Robert Rothschild, was reluctant to sign over his plant and took refuge in the Italian-occupied area of France, the Krupp managers hired a bunch of thugs to kidnap him, and he wound up in the gas chamber at Auschwitz."); RICHARD BREITMAN ET AL., U.S. INTELLIGENCE AND THE NAZIS 132 (2004) (noting "a blend of official and private larceny characteristic of Nazi Germany"). Those who profited from these mass killings were operating on a massive conspiratorial scale, aided by individual opportunists, disguising their criminal greed by reference to outrageous theories of race. Their often venal purpose was to enrich themselves by stealing from Jews and others.

The Court of Appeals for the Eleventh Circuit recently found that the result in *Burger-Fischer* was not a foregone conclusion. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004). The *Ungaro-Benages* court carefully considered the cases cited by

the defendants, including an analysis of the effect of the Foundation. It concluded that "federal court consideration of the present case does not reflect a lack of respect for the executive nor does it interfere with American foreign relations." *Id.* at 1236. As a result, it "parted ways with [the] district courts that have . . . considered Nazi era claims," *id.* at 1236 n.12, holding that the political question doctrine did not apply to a claim against banks alleging that they stole the stock of Jewish heirs as part of the "Aryanization" process. "Every time the Court finds a nonjusticiable political question, it ends all judicial debate on that particular issue. . . . The political question doctrine is a powerful weapon, for it allows actions of the legislative or executive branches to escape the fundamental constitutional system of checks and balances. It should be used with great restraint . . . ." *The Supreme Court, 1992 Term--Leading Cases*, 107 HARV. L. REV. 144, 303 (1993).

Defendants' argument that the instant case is merely a reparations case, and therefore raises a non-justiciable political question, is rejected. The Vietnam War did not result in formal reparations agreements and treaties as did some other American conflicts. The contention that suits by plaintiffs as individuals against defendants as individuals amount to reparations does not pass muster.

3. Judicial Power

a. Interference with Management of Foreign Affairs

Defendants essentially repeat their already refuted political question argument, *supra* Part VIII.E.2., when they cite *Sosa* for the proposition that plaintiffs' cause

of action would impermissibly "impinge on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 124 S. Ct. at 2744. The analysis employed to reject the claim of political question nonjusticiability applies with equal force to defendants' subpoint regarding interference with political branches' management of foreign affairs.

Their contention that the United States has already made the political decision not to provide reparations to Vietnam for the types of injury alleged in the complaint is unfounded and irrelevant. As noted above, this is not a case about reparations between nations, but rather a case about individuals suing other individuals for damages. The absence of a specific grant of reparations by Congress does not amount to a decision precluding tort actions under the ATS.

Defendants reiterate their position that creating a cause of action permitting foreign nationals injured by herbicides to recover damages would require the court to judge foreign policy and military decisions. This argument, already addressed in the political question context, is without merit. Courts do not usurp power by construing international law; it is the task of the judiciary to interpret treaties and customary international law, even when such interpretation leads to the conclusion that another branch has acted in violation of established international law principles. *Sosa* recognized how the root of the ATS was the Continental Congress's sense that it was "hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'" *Id.* at 2756 (citing J. MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed.,

1893)). The ATS was included in the Judiciary Act in response to this growing concern. *Id.*

b. Incompatibility with Norm of Proportionality

Defendants urge that several different congressional enactments embody policies that are flatly inconsistent with the recognition of a "proportionality-based" cause of action against military vendors, including Congress's decision to make the commission of a war crime a federal offense. This decision, defendants argue, reflects Congress's decision to make the international norm of proportionality enforceable only by criminal prosecutions subject to the check of prosecutorial discretion. See discussion of proportionality *infra* Part XI.D.3. They argue that the Federal Tort Claims Act's foreign country exception bars all claims based upon any injury suffered in a foreign country, and that permitting lawsuits to proceed against United States contractors would frustrate the purposes of this exception. Specifically, the defendants suggest that the risks associated with potential exposure to unknown foreign laws would cause contractors to shy away from federal military contracts or lead them to seek higher rates, indirectly imposing on the United States the precise type of liability the exception was designed to protect.

In short, they seek to rely on the government contractor defense. This defense is not available to them on the Vietnamese plaintiffs' international law claims. *See infra* Part IX.

c. Preemption of State Tort Claims by Executive's Power to Conduct Foreign Relations

Defendants contend that domestic tort law claims "that interfere with the Executive's exercise of foreign relations" are preempted by federal law. Defs.' Mem. of Law to Dismiss All Claims at 65-68. As discussed above in Part VI, plaintiffs' domestic law claims are barred by the government contractor defense.

Defendants principally rely upon *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 156 L. Ed. 2d 376, 123 S. Ct. 2374 (2003). In *Garamendi*, insurance companies and a trade association brought an action to enjoin the Insurance Commissioner of the State of California from enforcing a California statute requiring the disclosure of information about Holocaust-era insurance policies. The Supreme Court concluded that the Holocaust Victim Insurance Relief Act impermissibly interfered with the President's conduct of foreign affairs and was therefore preempted. *Garamendi* is readily distinguishable, as defendants themselves concede, because it involved a state statute that expressly conflicted with foreign policy objectives implicit in executive agreements. Much like the district courts in the post-Nazi-era cases discussed above in Part VIII.E.2., the Supreme Court in *Garamendi* went to great lengths to discuss the various post-war treaties and reparation agreements, including discussion of the Foundation. It concluded that "the express federal policy [encouraging European governments and companies to voluntarily set up settlement funds in preference to litigation or coercive sanctions] and the clear conflict raised by the state statute are alone enough to require state law to yield." *Id.* at 425. As in other post-Nazi-era litigation, the conflict with executive agreements was determinative in *Garamendi*.

The second case cited by the defendants in support of its preemption argument, *Zschernig v. Miller*, 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968), is also inapplicable. In *Zschernig,* the Supreme Court held that an Oregon statute stating the conditions under which an alien not residing in the United States or its territory could inherit property constituted an impermissible intrusion by the state into the field of foreign affairs. A relevant portion of the Oregon statute required an alien not residing in the United States to establish that he or she would be able to "'receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.'" *Id.* at 430 n.1 (quoting Ore. Rev. Stat. § 111.070 (1957)). The Court noted that the provision became operative in 1951, and that prior to that time, the rights of aliens under the Oregon statute were defined in general terms of reciprocity which had been approved by the Court. *Id.* at 432. The Court's concern stemmed from the increasing practice of state probate courts which,

> launched inquiries into the type of governments that obtain in particular foreign nations--whether aliens under their law have enforceable rights, whether the socalled rights are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of

confiscation.

. . . .

> We find that [these decisions] radiate some of the attitudes of the "cold war," where the search is for the "democracy quotient" of a foreign regime as opposed to the Marxist theory. The Oregon statute introduces the concept of "confiscation," which is of course opposed to the Just Compensation Clause of the Fifth Amendment. And this has led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should "not preclude wonderment as to how many may have been denied 'the right to receive' . . . ."

Id. at 434-35 (citations omitted). The Court observed that "as one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata. Yet they of course are matters for the Federal Government." *Id.* at 437-38. It concluded that the statute as construed intruded deeply into foreign affairs because it "seemed to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.* at 440. In the instant case, no similar risk is posed by the ordinary application of New York tort law, were it applicable.

These state law cases relied upon by defendants are not relevant to the problem at hand--determining what was the applicable international law during the Vietnam War. There is no conflicting state law.

F. Causation

Since there has been no discovery on general and specific causation, it would be premature to consider a motion to dismiss based on lack of causation--a motion not yet made. Should the Court of Appeals for the Second Circuit reverse dismissal on the grounds addressed in the present memorandum, the court will grant extensive discovery on the relevant general epidemiological and individual medical causation issues before addressing that problem. See *supra* Part II on lack of current data. Consideration of this issue is postponed as premature.

G. Retroactivity

A party is not bound by a treaty prior to the date such a treaty enters into force for it; treaties are not retroactive. Vienna Convention on the Law of Treaties, May 23, 1969, art. 28, 1155 U.N.T.S. 331, 339 (entered into force Jan. 27, 1980) ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."); *see also* J. Mervyn Jones, *The Retroactive Effect of the Ratification of Treaties*, 29 AM. J. INT'L L. 51 (1935). The Vienna Convention on the Law of Treaties, albeit not ratified by the United States to date, is regarded as largely declaratory of existing law and has been recognized as such by the United States Department of State. LORI FISLER DAMROSCH, LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW CASES

AND MATERIALS 452-54 (4th ed. 2001); *see also* DAVID J. BEDERMAN ET AL., INTERNATIONAL LAW: A HANDBOOK FOR JUDGES 18 (Am. Soc'y of Int'l Law 2003) ("Even though the United States is not a party [to the Vienna Convention on the Law of Treaties], it regards almost all of the [Convention]'s provisions as binding customary international law."). As Professor Anderson opined:

> International law as a general proposition does not permit retroactive application. Akehurst's treatise refers to the "general principle that laws should not be applied retroactively." Peter Malanczuk, Akehurst's Modern Introduction to International Law 155 (7th rev. ed. 1997). Two specific treaty examples . . . demonstrate the proposition. Article 28 of the Vienna Convention on the Law of Treaties, titled the "non-retroactivity of treaties," provides that unless a special intention is established, a treaty's provisions "do not bind a party in relation to any act or fact which took place . . . before the date of the entry into force of the treaty with respect to that party." 1155 U.N.T.S. 331 (entry into force 27 January 1980). The Rome Statute of the International Criminal Court . . . denies retroactive application; Art. 22(1) provides that a person "shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court," while Art. 24(1) provides that "no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute." 2187 U.N.T.S. 90 ([entered into force July 1, 2002; not

> ratified by the United States and the United States has filed a letter stating that it does not intend to become a party]). . . . International law could hardly develop if states believed that by accepting newly developed norms of international law, the result would be to hold them liable under today's norms for behavior acceptable under yesterday's. This consideration has particular importance for the international law of war--a body of law in which all acts for which individuals might be held liable are criminal . . . a body of law in which the acts at issue are ones involving great death, destruction and violence. States, in the interests of protecting their soldiers, would not agree to new and more restrictive rules, including criminal liability, if they believed that it would subject them and their military personnel to *ex post facto* liability.

Anderson Decl. ¶35 (footnote moved to text).

The force of arguments against retroactivity are enhanced as a barrier to a finding of liability when the principle of proportionality applies. Since proportionality in the application of force during war requires the contemporary exercise of discretion and clearly defined rules of engagement, it would be unjust to declare that new rules were in force after members of the armed forces or others acted in what they then thought was an appropriate manner under the regulations then reasonably believed to be in effect. *See also infra* Part XI.D.3.

H. Choice of Law

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700, 44 L. Ed. 320, 20 S. Ct. 290 (1900); *see supra* Part I. "International law and international agreements of the United States are law of the United States and supreme over the law of the several States." 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1). *But cf. Judicial Conference of the Second Judicial Circuit of the United States, June 15-16, 2001*, 225 F.R.D. 269, 384 (2005) ("JUSTICE O'CONNOR: Well you referred to the dicta in *Paquet [sic] Habana* that international law is part of our law. I think that was dicta and I don't think we have authoritatively taken that position . . . ."). As a Restatement comment puts the matter:

> A rule of international law or a provision of an international agreement derives its status as law in the United States from its character as an international legal obligation of the United States. A rule of international law or an international agreement has no status as law of the United States if the United States is not in fact bound by it: for example, any rule of customary law from which the United States may have disassociated itself during the process of its formation . . . .

1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. b. International law "is part of the law of the

United States, respected by Presidents and Congresses, and by the States, and given effect by the courts." *Id.* introductory note to pt. 1, ch. 1, at 17.

The Court of Appeals for the Second Circuit has avoided reaching the conflicts of law question of applicability of international law rather than that of the forum. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 n.12 (2d Cir. 2000) (noting that federal courts have never definitively resolved the choice-of-law question for ATS cases, and not reaching that question because its *forum non conveniens* dismissal was based on other grounds). On remand in *Wiwa*, the district court applied international law. 2002 U.S. Dist. LEXIS 3293, No. 96 Civ. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

While its analysis is not crystal clear, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 159 L. Ed. 2d 718, 124 S. Ct. 2739, 2752-54 (2004), can be read generally as adopting federal choice of law rules to causes of action applying international law. *See The Supreme Court--2003 Term, Leading Cases*, 118 HARV. L. REV. 446, 453 (2004) ("Much of the majority's analysis is consistent with the view that . . . all customary international law has been included within federal common law."); *id.* at 456 (stating that, in view of ambiguity, Congress should clarify scope of its grant of jurisdiction over alien tort claims). All three branches of our national government play a role in the recognition or creation of international substantive rules of law; this implies a rejection of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), for these claims. *Sosa*, 124 S. Ct. at 2762. Concomitantly *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941),

requiring federal courts in diversity and some other cases to follow the conflicts rule of the forum state, is inapplicable. *See also* WILLIS L. M. REESE & MAURICE ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 766 (6th ed. 1971) ("Considerations [of public questions with 'international complexion'] may lead a court to refrain from using choice of law approaches that would be applicable if states of the Union were the only ones involved."); Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 317 (2005) ("Even if the basic choice-of-law principles applicable in this area should be those of the forum, courts of the forum should not apply those rules in a manner that subordinates or ignores established or even emerging principals of international human rights law."). The *Sosa* court specifically rejected state choice of law rules in denying applicability of the headquarters doctrine because "current flexibility" in choice of law methodology [of the states or foreign countries] would sometimes lead to a result inconsistent with federal policy. *Sosa*, 124 S. Ct. at 2753 & n.8, 2754.

The Court of Appeals for the Ninth Circuit's analysis of choice of law in international law cases was instructive. *See Doe I v. Unocal Corp.*, 395 F.3d 932, 2002 WL 31063976, at *11 (9th Cir. 2002) (finding that violations of international law is the law that applies when it is in conflict with domestic state or federal law), *vacated & reh'g en banc granted by* 395 F.3d 978 (9th Cir. 2003). That the opinion was later vacated does not deprive its reasoning of persuasive power. It declared:

Unocal urges us to apply not international law, but the law of the state where the underlying events occurred, i.e., Myanmar. Where, as in the present case, only *jus cogens* violations are alleged--i.e., violations of norms of international law that are binding on nations even if they do not agree to them--it may, however, be preferable to apply international law rather than the law of any particular state, such as the state where the underlying events occurred or the forum state. The reason is that, by definition, the law of any particular state is either identical to the *jus cogens* norms of international law, or it is invalid.

Application of international law--rather than the law of Myanmar, California state law, or our federal common law--is also favored by a consideration of the factors listed in the Restatement (Second) of Conflict of Laws § 6 (1969). First, "the needs of the . . . international system[]" are better served by applying international rather than national law. Second, "the relevant policies of the forum" cannot be ascertained by referring . . . to one out-of-circuit decision which happens to favor federal common law and ignoring other decisions which have favored other law, including international law. Third, regarding "the protection of justified expectations," the "certainty, predictability and uniformity of result," and the "ease in the determination and application of the law to be applied," we note that the standard we adopt today from an admittedly recent case nevertheless goes back at least to the

> Nuremberg trials and is similar to that to the Restatement (Second) of Torts. Finally, "the basic policy underlying the particular field of law" is to provide tort remedies for violations of international law. This goal is furthered by the application of international law, even when the international law in question is criminal law but is similar to domestic tort law . . . .

395 F.3d 932, 2002 WL 31063976, at *11 (citations and footnotes omitted).

The *Unocal* case involved allegations of forced labor, that was the equivalent of slave labor, allegedly used by an American oil corporation in Myanmar cooperating with that country's military. Neither the law of a state of this country or of Myanmar could be permitted to override international human rights law forbidding use of forced labor and the accompanying torture and rape. (The *Unocal* case was later settled without a concession of liability by the defendant corporation. *See* Bloomberg News, *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6 (reporting that Unocal agreed to settle lawsuits alleging that it was responsible for human rights violations committed by soldiers of Myanmar who forced others to work on construction of a pipeline)).

Courts are not precluded from referring to appropriate state or national law for analogies to fill in procedural--and even substantive--gaps left in international law as it is shaped so it can be enforced in a reasonable way. *See* Statute of the International Court of Justice, June 26, 1945, art. 38(1)(d), 59 Stat. 1055, 1060 (entered into force Oct. 24, 1945) (providing that judicial decisions,

which include decisions of national courts, may be referred to as "subsidiary means for the determination of the rules of [international law]"). They may also have to determine such local matters as whether a plaintiff is authorized by local law to sue on behalf of an estate, a minor or an association. *Hilton v. Guyot*, 159 U.S. 113, 163-64, 40 L. Ed. 95, 16 S. Ct. 139 (1895) (defining international comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation"); *cf. Bigio v. Coca-Cola Co.*, 2005 U.S. Dist. LEXIS 1587, No. 97 Civ. 2858, 2005 WL 287397 (S.D.N.Y. Feb. 3, 2005) (dismissing, on the grounds of international comity and *forum non conveniens*, a suit seeking damages for conversion under New York state law arising from Egyptian government's nationalization of plaintiffs' property). *But cf. Zschernig v. Miller*, 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968) (holding that state statute cannot interfere with national policy during Cold War by limiting estate dispositions on grounds that a communist country will actually receive proceeds); see also *supra* Part VIII.E.3.c. (discussing *Zschernig*). Defendants in the present case have raised no such issue of authority of plaintiffs to represent minors or the estates of the deceased under Vietnam's laws. Whether ownership of all land within the borders of Vietnam is claimed by the communist government, preventing occupants to individually or collectively seek a detoxification remedy, may raise issues of Vietnam law that need not now be decided.

IX. Inapplicability of Government Contractor Defense

A. Position of the Government that Defense Applies to International Law-Based Claims

It is the position of the United States that the government contractor defense should apply to all of plaintiffs' international law claims. It argues:

> Plaintiffs' international law claims, to the extent that they are recognized at all, are recognized as federal common law claims. See Sosa, 124 S. Ct. at 2754, 2765-66. As such, they should be subject to the federal common law government contractor defense. See Boyle v. United Technologies Corp., 487 U.S. 500, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988). Although principles of international law suggest that a "superior orders" defense is unavailable in certain circumstances in the context of international criminal law, the rationales that led the Supreme Court to adopt the government contractor defense as a matter of federal common law in the context of state-law tort claims apply with even greater force to federal common law claims for damages based upon international law.
>
> . . . The Supreme Court based its adoption of the defense in *Boyle* on the principles underlying the discretionary function exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a) (which, along with the exceptions for combatant activities and claims arising abroad, would bar suit against the United States based on the conduct here at issue) . . . .
>
> Those "effect[s] sought to be avoided" are that "the financial burden of judgments against contractors would ultimately be passed through, substantially, if not totally, to the United States

itself . . . ." Id. at 512. See also id. at 507. The Court thus concluded that "it makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." Id. at 512.

The very same reasoning applies to the case at bar. Allowing plaintiffs' international law claims to proceed against the defendants would result in the very harms that both the discretionary function exception and *Boyle* were intended to prevent. Indeed, the rationale for application of the defense to claims such as plaintiffs is even stronger than was the case in *Boyle*, which involved claims of defective design. Here, plaintiffs' claims are based upon -- and necessarily call into question -- not only the Government's decision to procure the products at issue, but also the military decisions regarding the precise nature of their use. Thus, rather than simply seeking to hold the defendants liable for their own alleged negligence in the manufacture of an allegedly defective product, the plaintiffs essentially seek to hold the defendants liable for the decisions made by the President regarding the manner in which to prosecute the war in Vietnam. Allowing such claims to proceed would have even further reaching implications for military procurement than the claims at issue in *Boyle*, for it would expose defense contractors to potential liability for possibly unforseen uses of

the goods ordered by the American Armed Forces. . . .

Boyle was decided in the context of federal displacement of state law causes of action. Boyle, 487 U.S. at 507-08, 512. Here, by contrast, the question is one of the applicability of a federal common law defense to a federal common law cause of action derived from international law norms. If anything, the argument for application of the government contractor defense is even more compelling in these circumstances, for the source of the defense is the same as the source of the cause of action -- federal common law. Rather than displacing another source of law, the court would merely be applying and reconciling two federal common law concepts. If the federal interest in a government contractor defense is sufficient to pre-empt and displace state law, it is certainly applicable where the cause of action is based on federal law.

. . . .

Sosa further supports the conclusion that the government contractor defense should apply to federal common law claims based on international law norms. As noted above, *Sosa* cautioned that the "determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts." 124 S. Ct. at 2766 (footnote omitted). *See also* id. at 2763.

Although that admonition was directed at the process of determining whether a particular norm has attained a level of acceptance and definition so as to make it subject to a federal common law cause of action, the principle is equally applicable to the question of whether a federal common law defense should be recognized as applicable to such causes of action. In either case, the federal courts are engaging in judicial lawmaking, and it is the "practical consequences" of such lawmaking that the Supreme Court has admonished must be considered in the process. And the "practical consequences" here clearly support adoption of the government contractor defense.

First, *Boyle* itself was based on practical considerations, recognizing that allowing claims such as these to proceed against government contractors would result in an end-run around sovereign immunity and ultimately harm the public fisc. *Sosa's* reference to "practical consequences" is thus a clear invitation to apply the principles articulated in Boyle. Second, the practical consequences of allowing claims such as plaintiffs' to proceed are even more profound than the consequences at issue in *Boyle*. Holding the government contractor defense inapplicable to claims such as plaintiffs', which essentially challenge military judgments made by the President, would effectively invite all of the United States' past and future enemies to sue a wide variety of military contractors based on such Presidential decisions in United States courts. *See, e.g.*, 03/18/04 Tr. at 29-30. Such an

invitation would result not only in increased costs to the United States, but would embroil the judiciary in the review and appraisal of military decisions reserved to the political branches. . . . It also has the potential to impede the President's ability to carry out his duties as Commander in Chief, for every military decision -- from the tactical to the strategic -- would become the subject of potential litigation.

Moreover, reading *Boyle* and *Sosa* together strongly suggests that the government contractor defense should be deemed applicable in such circumstances. *Boyle* sets forth a clear rule of decision, based on principles derived from an Act of Congress, and contains no caveats or hesitations regarding the applicability of the defense there announced and applied. *Sosa*, by contrast, recognizes only an abstract principle, which was held inapplicable in that case, and is chock-full of references to the "caution" that must guide federal courts in this area, and the foreign policy and separation-of-powers concerns that mitigate against any broad reading of the decision. In light of the Supreme Court's clear holding in *Boyle* and its repeated expressions of caution in *Sosa*, the federal common law government contractor defense recognized in *Boyle* should be applicable to any federal common law causes of action derived from international law norms pursuant to *Sosa*.

. . . .

Moreover, international legal principles are not

inconsistent with the conclusion that the federal common law government contractor defense applies to claims based upon customary international law. As an initial matter, any such international legal principles are incorporated into U.S. law, if at all, as federal common law. And, as just discussed, federal common law has already been held to recognize the government contractor defense.

. . . .

More importantly, as the Court has recognized, the Nuremberg and Eichmann cases -- which would be the source of any alleged international law norm rendering the government contractor defense inapplicable in this case -- involved criminal, as opposed to civil, liability. *Id.* at 22. This is an important distinction. Criminal law involves questions of individual moral culpability and punishment, while civil law is intended to be remedial. The defenses of necessity and obedience to superior orders -- the closest criminal law analogues to the government contractor defense in the civil context -- are intended to reflect and account for the principles of individual moral responsibility that underlie criminal law, prohibiting punishment where the individual actor is deemed not to have had a true moral choice with respect to his actions. *See, e.g.*, International Law Commission, Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, Principle IV. By contrast, the government contractor defense -- as articulated

by the Supreme Court in *Boyle* -- is intended, ultimately, to protect the government from liability for actions that Congress has not seen fit to include within the scope of any waiver of sovereign immunity.

Recognizing that the criminal law seeks to punish individuals for acts for which they are morally culpable, and that the necessity and superior orders defenses are intended to provide a defense to those individuals who were not, in fact, morally culpable, both the Nuremberg and Eichmann cases focused on the actions and intent of the individual defendants in determining whether the defense at issue applied. *See, e.g., United States v. Krupp*, IX Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 ("Trials of War Criminals") at 1439, 1448 ("we hold that guilt must be personal"). Thus, in both the *Flick* and *Krupp* cases, the tribunal focused on the specific conduct of the individual defendants, both to ascertain the role they played in the wrongdoing and to assess the nature and extent of the willingness of their participation. In the *Flick* case, the tribunal found two defendants not guilty in light of the finding that they "were not desirous of employing foreign labor or prisoners of war" but "submitted to the program" under compulsion. *United States v. Flick*, VI Trials of War Criminals at 1197-98. Similarly, in the *Krupp* case, the tribunal emphasized that the defense of necessity turned on the mental state of the defendant and held that "if, in the execution of

the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct." *Krupp*, IX Trials of War Criminals at 1439. And, underlining the individual nature of criminal responsibility, the tribunal found one of the twelve defendants in the *Krupp* case not guilty of the charges based upon the deportation, exploitation and abuse of slave labor, due to the absence of individual responsibility for the crimes charged. *Id.* at 1449. Similarly, in the *Eichmann* case, the court noted that the defense of "constraint" or "necessity" "goes to the question of the motive that urged the accused to carry out the criminal act," and found that Eichmann himself had "performed the order of extermination at all times *con amore*, that is with full zeal and devotion to the task." *Attorney General of Israel v. Eichmann*, 16 Piske Din 2033 (1962) (Israel Supreme Court) (Hebrew), *reprinted in* 36 I.L.R. 277, 318 (1968) (emphasis in original).

As the preceding discussion demonstrates, the defenses of necessity and obedience to superior orders in international criminal law have focused upon the mental state and the moral responsibility of individual criminal defendants. Indeed, in *Flick* and *Krupp*, certain individuals involved with the Flick and Krupp concerns were found not guilty based on a lack of personal moral culpability, notwithstanding the corporate culpability of the companies. These criminal law defenses, focused as they are on the *mens rea* of

individuals, are thus not readily transferrable to the civil law context, particularly where the defendants are corporations rather than individuals.

At bottom, these criminal law defenses are grounded upon different rationales and serve different societal purposes than the civil government contractor defense. Even were the defenses of necessity and obedience to superior orders deemed inapplicable in the criminal context as a matter of international law, therefore, such a conclusion would by no means preclude application of the government contractor defense in the civil context applicable here.

. . . .

Finally, the Nuremberg and Eichmann cases are readily distinguishable in a more fundamental way. Those cases all involved conduct so abhorrent as to be readily identifiable as violative of international legal norms and all standards of civilized human conduct. By contrast, as discussed above, there was much debate regarding the wisdom and legality of the United States' use of chemical herbicides in Vietnam. Whatever one may conclude about the 1925 Geneva Protocol's intended applicability to chemical herbicides, it is beyond peradventure that the use of such herbicides constitutes conduct of a qualitatively different nature from the mass murder and slavery engaged in by the Nazis. *See* 03/18/04 Tr. at 22.

In addition to differentiating the heinous conduct engaged in by the Nazis and their accomplices from the conduct at issue here, this distinction is also legally relevant to the applicability of the government contractor defense. As the Israeli Supreme Court noted in *Eichmann*, the obedience to superior orders defense is generally "admissible where there was obedience to an order *not manifestly unlawful.*" *Eichmann*, 36 I.L.R. at 314 (emphasis added). *See also* Rome Statute of the International Criminal Court ("Rome Statute"), art. 33(1) (superior order defense available where order "not manifestly unlawful"). Although Israeli law provided that the defense was expressly not available under the Nazi Collaborators (Punishment) Law, the *Eichmann* court nevertheless noted that "even if we had to decide the case on the basis of the provisions of the general criminal law [which recognizes the defense], [we] would have had to reject the defence . . . because the order for physical extermination was manifestly unlawful." Id. at 314-15.

This principle was elaborated upon by the Jerusalem District Court:

> The distinguishing mark of a 'manifestly unlawful order' should fly like a black flag above the order given, as a warning saying "Prohibited! ". Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only by the eyes of legal experts, is important here, but a flagrant and manifest breach of the law,

> definite and necessary unlawfulness appearing on the face of the order itself, the clearly criminal character of the order or of the acts ordered to be done, unlawfulness piercing the eye and revolting the heart, be the eye not blind nor the heart stony and corrupt -- that is the measure of "manifest unlawfulness" required to release a soldier form the duty of obedience upon him and make him criminally responsible for his acts.

Attorney General of Israel v. Eichmann, 45 Pesakim Mehoziim 3 (Jerusalem Dist. Ct. 1965), *reprinted in* 36 I.L.R. 18, 256 (1968), *quoting Chief Military Prosecutor v. Melinki*, 13 Pesakim Mehoziim 90. *See also United States v. Ohlendorf* (The Einsatzgruppen Case), IV Trials of War Criminals 1, 470-73, 483-86 (discussing superior orders defense; "if the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance to the criminality of the order"); *The Llandovery Castle Case*, Supreme Court at Leipzig (1921), *reprinted in* 16 Am. J. Int'l L. 708, 721-22 (1922) (superior order defense inapplicable where "if such an order is universally known to everybody, including also the accused, to be without doubt whatever against the law").

The Zyklon B case is to the same effect. There, the tribunal found two of the three defendants guilty of supplying Zyklon B gas "for the extermination of allied nationals . . . well

knowing that the said gas was to be so used." *The Zyklon B Case (Trial of Bruno Tesch and Two Others), reported in*, 1 United Nations War Crimes Commission, Law Reports of the Trials of War Criminals 93 (1947). The case focused on the accuseds' knowledge of the uses to which the gas was to be put -- "the wholesale extermination of human beings." Id. at 94. The clear implication of the focus on the accuseds' knowledge is that the horrid nature of the crime was such that no defense of following orders was available. That is, in light of the "manifest illegality" of gassing millions of civilians, the only question before the tribunal was whether the defendants were aware of the uses to which the gas they provided was put.

The case at bar involves no such "manifestly illegal" conduct. To the contrary, as discussed above, no international law norm barred the use of chemical herbicides in war for purposes of defoliation or enemy crop destruction. One cannot say that use of such herbicides was "a flagrant and manifest breach of the law" or that the alleged "unlawfulness pierced the eye and revolted the heart." Rather, people of good will disagreed as to the moral and legal implications of using chemical herbicides. To the extent that international law norms governing the superior order defense inform the Court's analysis of the applicability of the government contractor defense to plaintiffs' international law claims, therefore, it is clear that international law does not preclude such a defense where, as here, the orders at issue were not manifestly illegal.

Finally in this regard, it is important to note that, to the extent that international legal norms have any role in the determination as to whether the federal common law government contractor defense is available in cases such as this, the proper inquiry is whether international law proscribes such a defense, not whether international law prescribes it. In light of the Supreme Court's ruling in *Boyle* recognizing the defense as a matter of federal common law, the only possible relevance of international legal norms would be if they categorically prohibited such a defense. Absent such a prohibition, the usual federal rule should be applied for the reasons discussed above.

And international law contains no such prohibition. *See generally* Charles Garraway, *Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied*, [hereinafter, Garraway, *Superior Orders*], Int'l Review of the Red Cross, No. 836, at 785-94 (1999), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList175/4F89CC080CE0E792C1256B66005DD767>. Although the Nuremberg Charter and Control Council Law No. 10 both provided that acting pursuant to an order of a superior does not free an individual from responsibility for a crime, those sources alone do not establish a *per se* rule of international law forbidding the application of a superior orders defense in all contexts. Rather, the Charter was intended to provide for the trials of the worst Nazi war criminals, whose conduct was recognized as

> manifestly illegal and thus not susceptible to such a defense. *See id.* Moreover, the concept of superior orders was in fact recognized by the Nuremberg tribunals as part of the concepts of necessity and intent, discussed above, and was thus not rejected entirely. *See* Garraway, *Superior Orders*. In addition, as noted above, the Rome Statute expressly provides for the applicability of such a defense for war crimes. Rome Statute, art. 33. At a minimum, therefore, international law does not forbid the recognition of such a defense. Accordingly, the federal common law defense recognized by the Supreme Court should be deemed applicable to the international law claims at issue here.

U.S. Statement of Interest at 50-61 (footnotes omitted).

B. Government Position Not Supported by Facts or Law

The government's view is not persuasive. To establish liability, the plaintiffs would have to show that the usage was illegal under international law; the defendants *knew how* their product would be used; and, that with knowledge, they supplied the product, facilitating and becoming a party to the illegality. "Unfairness" to government contractors is not a convincing ground for ignoring their corporate liability under international law since it would be necessary to show that the corporation was aware of the intended illegal use when it supplied its product.

In the instant case there is little doubt that it was widely known in the industry producing herbicides for

the Vietnam War how the herbicides were to be used. In view of the amounts and the close coordination between the military and industrial establishments this knowledge can be assumed on this 12(b)(6) motion. Defendants do not on their motions rely on ignorance.

The government contractor defense is one peculiar to United States law. *See supra* Part VI. It does not apply to violations of human rights and norms of international law. *See, e.g., Boyle v. United Techs. Corp.*, 487 U.S. 500, 512, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988) (limiting defense to claims for design defects); *see also Zyklon B Case (Trial of Bruno Tesch and Two Others)*, 1-5 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93; *United States v. Flick*, 6 TRIALS OF WAR CRIMINALS 1187, 1198, 1202 (discussing necessity); *United States v. Krupp*, 9 TRIALS OF WAR CRIMINALS 1327, 1437-39 (same); see also *infra* Parts IX.C.-D. Defendants' motion to dismiss on this ground is denied. *See supra* Part I.B.2.

The government contractor defense is essentially based on the concept that the government told me to do it, and knew as much or more than I did about possible harms, so I can stand behind the government (which cannot be sued because of its immunity). It is designed in part to save the government money in its procurement costs because suppliers, less concerned with the risk of suits, can eliminate some difficult insurance factors from cost projections.

As shown below in a discussion of the Nuremberg and other post-World War II criminal trials, this defensive notion has been rejected. It should not be recognized, as

the law now stands, by courts protecting civilians and land from depredations contrary to international law.

C. Zyklon B Case

The international law case most useful as an analogy on the point of the government contractor defense is the *Zyklon B Case (Trial of Bruno Tesch and Two Others)*, 1-5 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93-102. The statement of facts below is taken almost verbatim from the opinion in the case. No one, of course, suggests that use of herbicides in Vietnam is remotely comparable to the genocidal use of Zyklon B. *See, e.g.*, JOSEPH E. PERSICO, NUREMBERG INFAMY ON TRIAL 316-19 (Penguin Books 1995) (discussing use at Treblinka and Auschwitz for murder).

The accused, Bruno Tesch, Joachim Drosihn and Karl Weinbacher, were charged with a war crime in that they "'at Hamburg, Germany, between 1st January, 1941, and 31st March, 1945, in violation of the laws and usages of war did supply poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used.'" *Zyklon B. Case (Trial of Bruno Tesch and Two Others)*, 1-5 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93. They pleaded not guilty.

Tesch was by 1942 the sole owner of a firm known as Tesch and Stabenow, whose activities were divided into three main categories: (1) it distributed certain types of gas and gassing equipment for disinfecting various public buildings, including Wehrmacht barracks and S.S. concentration camps; (2) it provided, where

required, expert technicians to carry out these gassing operations; and (3) Tesch and Drosihn, the firm's senior gassing technician, carried out instruction for the Wehrmacht and the S.S. in the use of the gas which the firm supplied. The acceptable use of these gassing operations in war-time was for the extermination of lice. *Id.* at 94.

The chief gas involved was Zyklon B, a highly dangerous poison gas, 99 percent of which was prussic acid. It was manufactured by another firm. Tesch and Stabenow had the exclusive agency for the supply of the gas east of the River Elbe, but the Zyklon B itself went directly from the manufacturers to the customer. *Id.*

The Prosecution contended that from 1941 to 1945 Zyklon B was being supplied as a direct result of orders from the Third Reich accepted by the accused's firm, Tesch and Stabenow. The Zyklon B was being shipped in vast quantities to the largest concentration camps east of the Elbe. In these camps the S.S. Totenkopfverbande were, from 1942 to 1945, systematically exterminating human beings to an estimated total of six million, of whom four and a half million were exterminated by the use of Zyklon B in one camp alone, known as Auschwitz/Birkenau. *Id.*

In these concentration camps were a vast number of people, particularly Jews to be exterminated in the Nazis' "final solution." They came from the occupied territories of Europe, and included Czechs, Russians, Poles, French, Dutch and Belgians, from neutral countries and from the United States. The Prosecutor claimed that over a period of time the three

accused became aware of the S.S.'s use of Zyklon B gas for the wholesale extermination of human beings in the eastern concentration camps, and that, having acquired this knowledge, they continued to arrange supplies of the gas to these customers in ever-increasing quantities, until in the early months of 1944, the consignment per month to the Auschwitz concentration camp was nearly two tons. *Id.*

When Tesch was absent, Weinbacher was fully empowered and authorized to do all acts on behalf of Tesch, his principal, which Tesch could have done. Weinbacher's position was of great importance, since Tesch would travel on the business of the firm for as many as 200 days in the year. *Id.*

The case for the Prosecution was that knowingly to supply a commodity to a branch of the State which was using that commodity for the mass extermination of civilians was a war crime, and that the people who did it were war criminals for putting the means to commit the crime into the hands of those who actually carried it out. The accused's action was charged as being in violation of Article 46 of the Hague Regulations of 1907, to which the German government and Great Britain were both parties. *Id.*

In a business travel report, Tesch recorded an interview with leading members of the Wehrmacht, during which he was told that burial after the shooting of increasing numbers of Jews was proving more and more unhygienic, and that it was proposed to kill them with prussic acid. Tesch, when asked for his views, had proposed to use the same method, involving the release of prussic acid gas in an enclosed space, as was used in

the extermination of vermin. He trained the S.S. men in this new method of killing human beings. *Id.* at 95.

According to a former stenographer of the firm, Tesch, after dictating his travel report upon his return from Berlin in about June 1942, told her that Zyklon B was being used for gassing human beings, and he had appeared to be as terrified and shocked about the matter as she was. Others confirmed the extensive shipments and knowledge of the use of the gas by Tesch. He taught a class on how the gas could be used. A former high-ranking German government official stated that it was common knowledge in 1943 in Germany that gas was being used to kill people. *Id.* at 95-96.

Tesch testified that he had heard nothing and had known nothing about human beings being killed in concentration camps with prussic acid. He denied ever having attended any conference, or having been approached by any official or military authority on the subject, or having written in any document that human beings should be killed by prussic acid. Tesch contended that he had never been to Auschwitz himself and had had no reason to believe that the camps were incorrectly run. He did not think that deliveries to Auschwitz were very high. *Id.* at 97.

In his closing address Tesch's defense counsel submitted that, since the charge was not one of destroying human life but only of supplying the means of doing so, such action would be contrary to the laws and usages of war only if the means supplied were necessarily intended to kill human beings. To supply a material which also had quite legitimate purposes was

not a war crime. He submitted that even in the concentration camps the gas was, at least at the beginning, used only for its legitimate purpose. *Id.* at 98. Regarding the large supplies of gas to Auschwitz in particular, he submitted that Tesch was too busy to be expected to know what individual customers bought, and in any case the supply of Zyklon B was not as important to the firm as were its gassing activities. Furthermore, he argued that Tesch had regarded Auschwitz as a transit camp needing therefore unusually frequent delousing. Counsel concluded that Tesch knew nothing of the gassing of human beings either in Auschwitz or Neuengamme. *Id.* at 99.

Weinbacher's counsel submitted that it had become clear during the trial that Weinbacher did not know that Zyklon B had been used for the killing of human beings. *Id.* In any case, it had been shown that the quantity of Zyklon B needed to kill human beings was much smaller than that required to kill insects. The quantities of Zyklon B needed for killing half a million or even a million human beings stood in such small proportion to the quantities needed for the killing of insects that it would not have been noticed at all. Therefore, there had been no need for Weinbacher to have grown suspicious because he knew that Auschwitz was one of the biggest camps and a sort of transit camp. Counsel did not think, therefore, that it was correct to assume that the large quantity of Zyklon B going to Auschwitz was any indication of the fact that human beings were being killed there. *Id.* at 100.

The prosecutor urged that the possibility that some firm other than Tesch and Stabenow could have supplied Zyklon B to Auschwitz could be ruled out

because the firm had the monopoly in that area. The essential question was whether the accused knew of the purpose to which their gas was being put. The prosecutor admitted that the S.S. were under no restrictions as to the use they made of the gas, and that the direct knowledge which was available to Tesch as to that use was scanty, due to the fear and secrecy in which the S.S. worked. *Id.* at 100-01.

It was the prosecutor's argument that it was unbelievable that Tesch did not know that anything wrong went on in the concentration camps. One key witness had said without hesitation that he saw things there which were not worthy of human dignity, and that he had said so to Tesch. It was also unbelievable that Tesch had no knowledge of the amounts of gas being supplied to the S.S., and to Auschwitz in particular, by a firm which was wholly his property. In 1942 and 1943 Auschwitz had been the firm's second largest customer. Tesch had no reason to believe that Auschwitz was a transit camp; moreover, he was too efficient to be duped by the S.S. The prosecutor completed his case against Tesch by casting doubt on his veracity, showing contradictions between his statements and those of other witnesses on certain details unrelated to the main issue. Dealing very shortly with Weinbacher's position, the prosecutor contended that all that Tesch knew must, from the nature of the inner organization of the business, have also been known by Weinbacher. He concluded that, by supplying gas, knowing that it was to be used for murder, the three accused had made themselves accessories before the fact to that murder. *Id.* at 101.

The Judge Advocate, in summing up the evidence,

pointed out that the Court must be sure of three facts: (1) Allied nationals had been gassed by means of Zyklon B; (2) this gas had been supplied by Tesch and Stabenow; and (3) the accused knew that the gas was to be used for the purpose of killing human beings. He said: "To my mind, although it is entirely a question for you, the real strength of the Prosecution in this case rests rather upon the general proposition that, when you realize what kind of a man Tesch was, it inevitably follows that he must have known every little thing about his business. The Prosecution asks you to say that the accused and his second-in-command Weinbacher, both competent business men, were sensitive about admitting that they knew at the relevant time of the size of the deliveries of poison gas to Auschwitz. The Prosecution then asks: "Why is it that these competent business men are so sensitive about these particular deliveries? Is it because they themselves knew that such large deliveries could not possibly be going there for the purpose of delousing clothing or for the purpose of disinfecting buildings?" *Id.*

Tesch and Weinbacher were found guilty. They were sentenced to death. The sentences were carried out. Drosihn was acquitted. *Id.* at 102.

In the notes on the case, the following relevant points were made supporting the view that a private supplier of killing materials which violate international law is liable despite the fact that the government ordered it to do so.

> The decision of the Military Court in the present case is a clear example of the application of the

> rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist in their violation.
>
> The activities with which the accused in the present case were charged were commercial transactions conducted by civilians. The Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal.

Id. at 103.

D. Nuremberg Military Tribunals

The proposition that commands from the state and higher authorities within the state can not justify a person's commission of, or knowing participation in, an international crime was repeatedly made before the Nuremberg Military Tribunals. *See also, e.g.*, TIM MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIME TRIALS (2001). One example is set out below.

> Except as to some of Steinbrinck's activities the defendants were not officially connected with the Nazi government but were private citizens engaged as businessmen in the heavy industry of Germany. Their counsel, and Flick in his closing unsworn statement, contended that in their persons industry itself is being persecuted. They have some shade of justification for so believing

since the prosecution at the very beginning of the case made this statement--

> "The defendants in this case are leading representatives of one of the two principal concentrations of power in Germany. In the final analysis, Germany's capacity for conquest derived from its heavy industry and attendant scientific techniques, and from its millions of able-bodied men, obedient, amenable to discipline, and overly susceptible to panoply and fanfare. Krupp, Flick, Thyssen, and a few others swayed the industrial group; Beck, Fritsch, Rundstedt, and other exemplars ruled the military clique. On the shoulders of these groups Hitler rode to power, and from power to conquest."

. . . .

The question of the responsibility of individuals for such breaches of international law as constitute crimes has been widely discussed and is settled in part by the judgment of IMT. It cannot longer be successfully maintained that international law is concerned only with the actions of sovereign states and provides no punishment for individuals.

> "That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized. In the recent case of *ex parte Quirin* (1942, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3), before the

> Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said:
>
> "'From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribed for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals'."

. . . It is urged that individuals holding no public offices and not representing the State, do not, and should not come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest, and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in *propria persona*. The application of international law to individuals is no novelty. (See The Nuernberg Trial and Aggressive War by Sheldon Glueck, ch. V, pp. 60-67, incl., and cases there cited.) There is

> no justification for a limitation of responsibility to public officials.

United States v. Flick, 6 TRIALS OF WAR CRIMINALS 1187, 1191-92 (footnote omitted). The case involved use of slave laborers. The fact that Flick, one of the key defendants, was the head of a huge privately-operated corporate consortium responding to Nazi government requests was no defense. *Id.* at 1192-93, 1202.

E. Necessity Distinguished

The defense of necessity referred to in the *Flick* case, requiring a high degree of compulsion, is different from that of the government contractor defense. *See* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 193 (photo. reprint 1997) (1949) ("The defense of 'necessity' was unqualifiedly rejected [in connection with Krupp].").

> Recognizing the criminality of the Reich labor program as such, the only question remaining for our decision with respect to this count is whether the defendants are guilty of having employed conscripted foreign workers, concentration camp inmates or prisoners of war allocated to them through the slave-labor program of the Reich under the circumstances of compulsion under which such employment came about. . . . It is clear, however, that relation of [Albert] Speer and [Walter] Funk [who were found guilty in another IMT trial] to such [slave-labor] program

differs substantially from the nature of the participation in such program by the defendants in this case. Speer and Funk were numbered among the group of top public officials responsible for the slave-labor program.

We are not unmindful of the provision of paragraph 2 of Article II of Control Council Law No. 10 which states that--

> "2. Any person without regard to the nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission ***."

Nor have we overlooked the provision in paragraph 4(b) of Article II of such Control Council Law No. 10 which states—

> "(b) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."

In our opinion, it is not intended that these provisions are to be employed to deprive a defendant of the defense of necessity under such circumstances as obtained in this case with

respect to defendants Steinbrinck, Burkart, Kaletsch, and Terberger. This Tribunal might be reproached for wreaking vengeance rather than administering justice if it were to declare as unavailable to defendants the defense of necessity here urged in their behalf. This principle has had wide acceptance in American and English courts and is recognized elsewhere.

Wharton's Criminal Law, volume I, chapter III, subdivision VII, paragraph 126 contains the following statement with respect to the defense of necessity citing cases in support thereof:

> "Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil."

A note under paragraph 384 in chapter XIII, Wharton's Criminal Law, volume I, gives the underlying principle of the defense of necessity as follows:

> "Necessity forcing a man to do an act justifies him, because no man can be guilty of a crime without the will and intent in his mind. When a man is absolutely, by natural necessity, forced, his will does not go along with the act. Lord Mansfield in Stratton's Case, 21 How. St. Tr. (Eng.) 1046-1223."

The prosecution, on final argument, contended that the defendants are barred from interposing the defense of necessity. In the course of its argument, the prosecution referred to paragraph 4(b), of Article II of Control Council Law No. 10 and stated:

> "This principle has been most frequently applied and interpreted in military cases ***."

Further on in the argument, it was said:

> "The defendants in this case, as they have repeatedly and plaintively told us, were not military men or government officials. None of the acts with which they are charged under any count of the indictment were committed under 'orders' of the type we have been discussing. By their own admissions, it seems to us they are in no position to claim the benefits of the doctrine of 'superior orders' even by way of mitigation."

The foregoing statement was then closely followed by another, as follows:

> "The defense of 'coercion' or 'duress' has a certain application in ordinary civilian jurisprudence. But despite the most desperate efforts, the defendants have not, we believe, succeeded in bringing

> themselves within the purview of these concepts."
>
> The prosecution then asserted that this defense has no application unless the defendants acted under what is described as "clear and present danger." Reference was made to certain rules and cases in support of such position.
>
> The evidence with respect to defendants Steinbrinck, Burkart, Kaletsch, and Terberger in our opinion, however, clearly established that there was in the instant case "clear and present danger" within the contemplation of that phrase. We have already discussed the Reich reign of terror. The defendants lived within the Reich. The Reich, through its hordes of enforcement officials and secret police, was always "present," ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of governmental regulations or decrees.

United States v. Flick, 6 TRIALS OF WAR CRIMINALS 1187, 1199-1201.

A factual issue is presented with respect to whether the defendants in the instant case can support the necessity defense under Nuremberg jurisprudence even if the government contractor defense is established only for domestic torts, as it is here. *See, e.g., United States v. Reimer*, 356 F.3d 456, 459-63 (2d Cir. 2004) (rejecting, in an action to revoke citizenship, a naturalized citizen's argument that he had not assisted the Nazis in

persecution because he had done so involuntarily); *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 221 (1947) ("Individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."). The legal principles are not the same. Moreover, the concerns of the United States about the terms of the Statute of the International Criminal Court, adopted in Rome on July 17, 1998, based on solicitude for soldiers who have to decide in the heat of battle whether to obey an order which may violate human rights, as suggested in the discussion of proportionality *infra* Part XI.D.3., is quite different from that of a corporation which can consult counsel and reflect before following an illegal order to supply products to be used to harm people in violation of international law. *See, e.g.*, L. Doswald-Beck, *The Value of the 1977 Geneva Protocols for the Protection of Civilians, in* ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION 137, 149-50 (Michael A. Meyer, ed., 1989) (discussing special problems in guerilla warfare where combatants may hide among civilians); Paola Gaeta, *The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law*, 10 EUR. J. INT'L L. 172 (1999); Charles Garraway, *Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied*, INT'L REV. OF THE RED CROSS, No. 836, at 785 (1999),

http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/4F89CC080CE0E792C1256B66005DD767; Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3 (1994); Mark L. Sacharoff, *Problems and Paradoxes of the Laws of Warfare*, 6 TEMP. INT'L & COMP. L.J. 71 (1992) (discussing increased flouting of rules of warfare); Bernard K. Shafer, *The Relationship Between the International Laws of Armed Conflict and Environmental Protection: The Need to Reevaluate What Types of Conduct are Permissible During Hostilities*, 19 CAL. W. INT'L L.J. 287 (1989); Nicole Barrett, Note, *Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos*, 32 COLUM. HUM. RTS. L. REV. 429 (2001). *See generally* Op. of W. Michael Reisman Submitted in Support of Defendants' Motion to Dismiss, Nov. 1, 2004, at 54-59 (discussing proportionality of spraying of herbicides to protect troops against ambush) [hereinafter Reisman Op.].

Flick was found guilty of charges reflecting his commercial activities and those of his corporations on behalf of the Third Reich despite his claim of necessity. *United States v. Flick*, 6 TRIALS OF WAR CRIMINALS 1187, 1202, 1212, 1222-23; *see also United States v. Krupp*, 9 TRIALS OF WAR CRIMINALS 1327, 1327-1452. Kugler, an official in the Farben enterprises, was found guilty of supplying the gas. *United States v. Krauch (I.G. Farben Case)*, 8 TRIALS OF WAR CRIMINALS 1081, 1167; *see also id.* at 1174-79 (discussing necessity defense); *id.* at 1179 ("The defense of necessity is not available where the party seeking to invoke it was, himself, responsible for the

existence or execution of such order or decree, . . ., or was the result of his own initiative."); *id.* at 1153-66 (finding deficient proof of personal responsibility).

Defendants in the case at bar were ordered by the government to produce as much Agent Orange as they could and to promptly deliver it to the government. Such a commercial order, even in wartime, hardly constitutes "necessity" under domestic or international law.

In the first place, even where necessity under the facts would exist in criminal law, it may not provide a defense for damages in a civil action. As the Model Penal Code puts the matter, "the fact that conduct is justifiable under this Article [of Affirmative Defenses] does not abolish or impair any remedy for such conduct that is available in any civil action." MODEL PENAL CODE AND COMMENTARIES § 3.01(2) (1985).

Second, the choice of evils must clearly favor the harmful act by the defendant: "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . . ." *Id.* § 3.02(1)(a). Execution of a legal act constituting a public duty would be a justification, *see id.* § 3.03(1)(d), but here, by hypothesis, the conduct is illegal under international law and cannot be an appropriate public duty. The most serious harm that could have come to defendants if they had refused to supply Agent Orange would have been loss of their manufacturing establishments and other assets through expropriation. Such possible economic harm would not have been more evil than violating international law (*if* it existed), leading to the alleged death and disease

of many persons and destruction of much land (*if* there was causation).

We are a nation of free men and women habituated to standing up to government when it exceeds its authority. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863, 62 Ohio Law Abs. 417 (1952) (holding that seizure of steel mill during a war on an order of the President "to avert a national catastrophe" in his position as Commander-in-Chief of the armed forces exceeded his constitutional power). Under the circumstances of the present case, necessity is no defense. *If* defendants were ordered to do an act illegal under international law they could have refused to do so, if necessary by abandoning their businesses. "The Executive and others are clearly bound by the laws of war as well as other types of international law." Paust Op. at 42-43, 43 n.29 (citing U.S. CONST., art. II, § 3; *Ford v. United States,* 273 U.S. 593, 606, 71 L. Ed. 793, 47 S. Ct. 531, Treas. Dec. 42121 (1927); *Valentine v. Neidecker,* 299 U.S. 5, 14, & n.12, 18, 81 L. Ed. 5, 57 S. Ct. 100 & n.12 (1936); *Francis v. Francis,* 203 U.S. 233, 240, 242, 51 L. Ed. 165, 27 S. Ct. 129 (1906); *In re Neagle,* 135 U.S. 1, 64, 34 L. Ed. 55, 10 S. Ct. 658 (1890); *Chew Heong v. United States,* 112 U.S. 536, 563, 28 L. Ed. 770, 5 S. Ct. 255 (1884); *The Lessee of Pollard's Heirs v. Kibbe,* 39 U.S. (14 Pet.) 353, 415, 10 L. Ed. 490 (1840); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 594, 8 L. Ed. 483 (1832); *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110, 2 L. Ed. 49 (1801) (Marshall, C.J.); *Ware v. Hylton,* 3 U.S. 199, 1 L. Ed. 568, 3 U.S. (3 Dall.) 199 at 272 (Iredell, J.);*Taylor v. Morton,* 23 F. Cas. 784, 786, F. Cas. No. 13799 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, J., on circuit), *aff'd,* 67 U.S. (2 Black) 481, 17 L. Ed. 277 (1862);

United States v. Cooper, 25 F. Cas. 631, 641-42, F. Cas. No. 14865 (C.C.D. Pa. 1800) (No. 14,865) (Chase, J., on circuit); 1 Op. Att'y Gen. 566, 569-71 (1822); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7-11, 169-73, 488-89, 493-94 (2d ed. 2003)).

X. History of Abuse of Civilians and Land During War and Attempts to Limit Harm

Before analyzing the specific international law theories of plaintiffs, a brief summary of the history of harms to civilians and land during war, and efforts to limit or eliminate these abuses, seems useful. The historical context may be helpful in interpreting applicable law. Some examples of abuse (Table II) are followed by a brief description of some of the attempts at protection by international law and religious authorities (Table III).

A. History

Table II

Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
1000 B.C.	Chinese armies used arsenic	AL MAURONI, CHEMICAL AND
	smoke in battle.	BIOLOGICAL WARFARE 80 (2003).
600 B.C.	Assyrians poisoned enemy	Id.

Table II

Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
	water	
	supplies with rye ergot.	
590 B.C.	Solon of Athens used hellebore	Jason Robey, Bioterror
	roots (a purgative) to poison	Through Time, at
	the water in an aqueduct leading	http://dsc.discovery.com/anth
	from the Pleistrus River to the	ology/spotlight/bioterror/his
	city of Cirrha.	tory/history.html (last
		visited Nov. 5, 2004).
429-424 B.C.	During the Peloponnesian War,	MAURONI, supra, at 80.
	Spartans used toxic smoke,	
	created by burning wax and	
	sulfur, and flame against Athens	

Table II

Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
	and its allies.	
400 B.C.	Scythian archers used arrows	ERIC CRODDY ET AL., CHEMICAL
	dipped in putrefying corpses and	AND BIOLOGICAL WARFARE: A
	feces.	COMPREHENSIVE SURVEY FOR THE
		CONCERNED CITIZEN 219 (2002).
187 B.C.	Inhabitants of Ambracia in	MAURONI, supra, at 80.
	Epirus used toxic smoke to drive	
	off Romans from their walls.	
190 B.C.	During the Second Macedonian	CRODDY, supra, at 219.
	War, Hannibal's forces threw	
	poisonous	

Table II
Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
	snakes onto the ships	
	of King Eumenes.	
146 B.C.	During the Third Punic War	Carthage (ancient city),
	(149-146 B.C.), the Romans	Microsoft Encarta Online
	destroyed Carthage and spread	Encyclopedia 2004,
	salt over the ruins.	http://encarta.msn.com/encycl
		opedia_761557005/Carthage_
		(ancient_ci+y).html.
82-72 B.C.	Romans used "toxic smoke"	United Kingdom Ministry of
	against the Charakitanes in	Defense, Defending Against
	Spain causing pulmonary problems	the Threat of Biological and
	and blindness.	Chemical Weapons,
		http://www.mod.uk/issues/cbw/

Table II
Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
		history.htm (last visited
		Mar. 25, 2004) (note that
		this site no longer exists)
		[hereinafter U.K. MoD].
1155	In the siege of Tortona, Italy,	U.K. MoD, supra.
	Emperor Frederick Barbarossa	
	conquered the town after	
	poisoning the water supply.	
1340	During the Hundred Years War,	MARK WHEELIS, Biological
	the Duke of Normandy, besieging	Warfare before 1914, in
	Thun l'Eveque castle, "dyd cast	BIOLOGICAL AND TOXIN WEAPONS:
	in deed horses, and beestes	RESEARCH, DEVELOPMENT AND USE
	stynking,	FROM THE MIDDLE AGES

Table II
Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
	wherby they within had	TO 1945,
	greater dystres thane with any	at 8, 10-11 (Erhard Geissler
	other thynge, for the ayre was	& John Ellis van Courtland
	hote as in the middle of somer:	Moon, eds., 1999).
	the stynke and ayre was so	
	abomynable, that they consydred	
	howe that finally they coude nat	
	long endure."	
1346	Mongol forces catapulted	Id. at 13-14.
	plague-infected cadavers into	
	the Genoese city of Caffa.	
1422	Prince Korybut, besieging	Id. at 16.

Table II

Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
	Karlstein, a fortress in	
	Bohemia, used machines to throw	
	waste and the corpses of his	
	dead soldiers into the city.	
1710	Russian troops are said to have	Id. at 17.
	hurled plague casualties into	
	Reval, Estonia.	
1710	The Iroquois threw flayed animal	Id. at 27.
	skins into a river, upstream	
	from an English military	
	encampment, to corrupt the	
	water.	

Table II
Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
1763	During the Indian Wars, British colonial forces attempted to infect Indians by giving them smallpox-infected blankets at Fort Pitt, Pennsylvania.	Id. at 22.
1776	British forces reportedly tried to communicate smallpox to the Continental Army. One alleged method was inoculation or variolation, the practice of deliberately	Id. at 28-29.

Table II

Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
	inoculating a susceptible person with matter from a smallpox pustule, with the idea that this person would be able to spread it and thereby initiate an outbreak of fully virulent smallpox.	
1797	Napoleon attempted to infect the inhabitants of the besieged city of Mantua with swamp fever during his Italian campaign.	U.K. MoD, supra.

Table II

Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
1831	Traders, who often sustained losses from attacks by Plains Indians along the trade route between St. Louis and Santa Fe, allegedly brought smallpox-infested clothing and tobacco to distribute to Indians they met along the way. In 1832, the Pawnee Indians are alleged to have lost half their tribe due to a devastating epidemic of	WHEELIS, supra, at 25.

Table II
Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
	smallpox.	
1846	Cochrane (then a British Rear Admiral) submitted a plan involving the use of shells containing cacodyl and cacodyl oxide mixed with a self-igniting liquid. The committee, endorsed by the Duke of Wellington, suppressed the plan because "it would not accord with the feelings and principles of civilised	U.K. MoD, supra.

Table II

Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
	warfare."	
1855	During the Crimean War, the British military considered using projectiles containing cacodyl cyanide. The idea was rejected.	MAURONI, supra, at 80.
1863	During the Civil War, Confederate troops allegedly contaminated wells and ponds with animal carcasses during their retreat from Vicksburg.	Id. at 80-81.
1915-1916	The Germans used chlorine	Id. at 81.

Table II
Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
	gas	
	against Allied Forces at Ypres.	
	The British retaliated with	
	chlorine at Loos.	
1917	The Germans used mustard gas at	Id.
	Ypres on July 12, 1917.	
1935-1936	Italian forces used mustard gas	Id. at 82.
	bombs and aerosol sprayers in	
	Ethiopia.	
1937-1945	Japan used gas and	DOCUMENTS ON THE LAWS OF WAR
	bacteriological weapons in	156 (Adam Roberts & Richard
	China.	Guelff, eds., 3d ed. 2004

Table II

Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
		reprint)
1939-1945	Genocide by Germans, Austrians	Post-War trials of Germans
	and Japanese by poison, burning,	and Japanese
	starvation, shooting and	
	experiments.	
1939-1945	World War II incineration of	Judicial notice.
	cities by aircraft bombing was	
	utilized by all sides.	
1945	United States used atomic bombs	Judicial notice.
	on two Japanese cities,	
	Hiroshima and Nagasaki.	

Table II
Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
1960s	British used herbicides during	PETER H. SCHUCK, AGENT ORANGE
	the insurgency in Malaya and	ON TRIAL: MASS TOXIC
	United States used them in	DISASTERS IN THE COURTS 16
	Vietnam.	(enlarged ed. 1987).
1967	Egyptian forces bombed Yemeni	MAURONI, supra, at 87.
	royalists with mustard and nerve	
	agents during Yemeni civil war.	
1980-1988	During the Iran-Iraq War, Iraqi	DOCUMENTS ON THE LAWS OF WAR,
	forces used chemical weapons	supra, at 157; MAURONI,
	against Iranian forces. Iraq	supra, at 90.
	also used	

Table II
Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
	chemical weapons	
	against its Kurdish minority	
	population, in particular in the	
	town of Halabja.	
1990-1991	Threat of possible use of	MAURONI, supra, at 92.
	biological and chemical weapons	
	by Iraq during the first Gulf	
	conflict.	
1994-1995	Sarin attacks by the Japanese	Id. at 93-94.
	Aum Shinrikyo sect at Matsumoto,	
	Japan in 1994 and on the Tokyo	

Table II

Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
	subway in March 1995.	
1995	Iraq admitted to an extensive biological weapons program.	Id. at 94.
2001	On September 11, two skyscrapers in New York were destroyed by terrorists crashing commercial passenger aircraft into them using aircraft fuel as an incinerating device.	Judicial Notice

Table II

Historical Examples of Biological, Chemical and Other Methods of Mass Killings or Disablements

Date	Action	Source
	In October, anonymous letters containing anthrax were addressed to news media and government officials in the United States.	MAURONI, supra, at 97; Robey, supra.

B. Attempts to Protect Civilians and Land by Treaties, Custom and Religious Edicts

Part of the history of attempts to legally limit the use of poisons applied by air and otherwise is described in R.R. Baxter & Thomas Buergenthal, *Legal Aspects of the Geneva Protocol of 1925*, 64 AM J. INT'L L. 853 (1970).

Table III

Some Relevant International Agreements, Religious and Related Documents Designed to Protect People, Property and Land Against Methods Described in Table I

Date	Description	Source

Table III

Some Relevant International Agreements, Religious and Related Documents

Designed to Protect People, Property and Land Against Methods Described in

Table I

Date	Description	Source
1500 B.C.	Hindu text setting out the	Rig Veda 6-75:15, at
	rules of war:	http://www.bbc.co.uk/religion
	"Do not poison the tip of	/ethics/war/hinduism.shtml
	your arrow"	(last visited Dec. 10, 2004).
	"Do not attack the sick or	
	old"	
	"Do not attack a child or a	
	woman"	
	"Do not attack from behind"	
	A warrior will go to hell if	
	he breaks any of these rules.	
1000 B.C.	"When you lay siege to a city	Deuteronomy 20:19-21.
	for a long time, fighting	
	against it to	

Table III
Some Relevant International Agreements, Religious and Related Documents
Designed to Protect People, Property and Land Against Methods Described in
Table I

Date	Description	Source
	capture it, do	
	not destroy its trees by	
	putting an ax to them,	
	because you can eat their	
	fruit. Do not cut them down.	
	Are the trees of the field	
	people, that you should	
	besiege them? However, you	
	may cut down trees that you	
	know are not fruit trees and	
	use them to build siege works	
	until the city	

Table III

Some Relevant International Agreements, Religious and Related Documents Designed to Protect People, Property and Land Against Methods Described in Table I

Date	Description	Source
	at war with	
	you falls."	
400 B.C.	In wars with fellow Greeks,	THOMAS L. PANGLE & PETER J.
	'the countryside is not to be	AHRENSDORF, JUSTICE AMONG
	laid waste."	NATIONS: ON THE MORAL BASIS
		OF POWER AND PEACE 39 (1999)
		(citing Socrates).
633 A.D.	Instruction from Abu Bakr,	Islam and the Ethics of War,
	the first Caliph of Islam, to	http://www.bbc.co.uk/religion
	an army he was sending to	/ethics/war/islam.shtml (last
	battle:	visited Dec. 10, 2004).
	"Neither kill a child, nor a	

Table III

Some Relevant International Agreements, Religious and Related Documents

Designed to Protect People, Property and Land Against Methods Described in

Table I

Date	Description	Source
	woman, nor an aged man."	
	"Bring no harm to the trees,	
	nor burn them with fire,	
	especially those which are	
	fruitful."	
	"Slay not any of the enemy's	
	flock, save for your food."	
1023	Excerpt of peace oath	MATTHEW STRICKLAND, WAR AND
	proposed by Bishop Warin of	CHIVALRY: THE CONDUCT AND
	Beauvais to the Capetian	PERCEPTION OF WAR IN ENGLAND
	king, Robert	AND NORMANDY, 1066-

Table III

Some Relevant International Agreements, Religious and Related Documents

Designed to Protect People, Property and Land Against Methods Described in

Table I

Date	Description	Source
	the Pious:	1217, at
	"I will not burn or destroy	258 (1996).
	houses unless I find an enemy	
	horseman or thief . . .	
	within, and unless they are	
	joined to a real castle. I	
	will not cut down or uproot	
	the vineyards of another, or	
	harvest them for reasons of	
	war . . ., unless it is on my	
	own land . . . I will not	
	destroy a mill or seize the	

Table III

Some Relevant International Agreements, Religious and Related Documents

Designed to Protect People, Property and Land Against Methods Described in

Table I

Date	Description	Source
	grain that is in it, unless I	
	am on a cavalcade or with the	
	host . . ., or it is on my	
	land . . . I will not attack	
	merchants or pilgrims or take	
	their possessions unless they	
	commit crimes. I will not	
	kill the animals of villeins	
	except for my consumption and	
	that of my men."	

Table III
Some Relevant International Agreements, Religious and Related Documents
Designed to Protect People, Property and Land Against Methods Described in
Table I

Date	Description	Source
August 27, 1675	French-German bilateral	Strasbourg Agreement, article
	agreement to prohibit the use	57
	of "perfidious and odious"	
	toxic devices, including	
	poisoned bullets. This was	
	the first international	
	agreement in modern history	
	limiting the use of chemical	
	weapons.	
1862	"The use of poison in any	Union Army General Order No.

Table III
Some Relevant International Agreements, Religious and Related Documents
Designed to Protect People, Property and Land Against Methods Described in
Table I

Date	Description	Source
	manner, be it to poison	100. Attributed to Frances
	wells, or food, or arms, is	Lieber. See Fletcher Op. at
	wholly excluded from modern	36-39, 41. But see infra Part
	warfare."	XI.D. (discussing Grant's
		view).

December 11, 1868	Banning, on reciprocal basis,	Saint Petersburg Declaration
	use in war of any projectile	Renouncing the Use, in Time
	weighing less than forty	of War, of Explosive
	grams, "which is either	Projectiles Under 400 Grammes
	explosive or charged with	Weight
	fulminating or inflammable	
	substances."	

Table III

Some Relevant International Agreements, Religious and Related Documents

Designed to Protect People, Property and Land Against Methods Described in

Table I

Date	Description	Source
August 27, 1874	Forbidding "employment of poison or poisoned weapons."	Conference of Brussels, Article 13(a) (Project of an International Declaration Concerning the Laws and Customs of War)
July 29, 1899	Agreeing to abstain from using "projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases." United States did not	Hague Declaration (IV, 2) Concerning Asphyxiating Gases

Table III

Some Relevant International Agreements, Religious and Related Documents

Designed to Protect People, Property and Land Against Methods Described in

Table I

Date	Description	Source
	sign.	
October 18, 1907	"Especially" forbidding the	Hague Convention IV
	use of poison or poisoned	Respecting the Laws and
	weapons.	Customs of War on Land and
		Annex to the Convention,
		Regulations Respecting the
		Laws and Customs of War on
		Land, article 23
June 28, 1919	Prohibiting production and	Treaty of Versailles
	use of poison gas by Germany.	
February 6, 1922	Declaring that the	Treaty of Washington Relating
	prohibition in the use of war	to the Use of Submarines and
	of "asphyxiating,	Noxious Gases in Warfare,

Table III

Some Relevant International Agreements, Religious and Related Documents

Designed to Protect People, Property and Land Against Methods Described in

Table I

Date	Description	Source
	poisonous	
	or other gases, and all	article 5
	analogous liquids, materials	
	or devices . . . shall be	
	universally accepted as a	
	part of international law."	
	Treaty did not enter into	
	force due to France's failure	
	to ratify it based on	
	objections to provisions on	
	submarine warfare.	

Table III

Some Relevant International Agreements, Religious and Related Documents

Designed to Protect People, Property and Land Against Methods Described in

Table I

Date	Description	Source
June 17, 1925	Recognizing prohibition of use in war of poison gases and prohibiting bacteriological methods of warfare.	Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (also referred to as 1925 Geneva Protocol)
January 1931	The British preferred the broader interpretation, which stated that prohibition on certain gases included all other gases. The French	Franco-British Interpretation of 1930: Memorandum by the British Delegation to the League of Nations Preparatory Commission for the

Table III

Some Relevant International Agreements, Religious and Related Documents

Designed to Protect People, Property and Land Against Methods Described in

Table I

Date	Description	Source
	interpreted it to apply "to	Disarmament Conference
	all gases employed with a	seeking clarification of the
	view to toxic action on the	English and French
	human organism."	translations of the 1925
		Geneva Protocol.
December 16, 1969	Declaring as contrary to	United Nations Resolution
	international law under the	2603-A
	1925 Geneva Protocol the use	
	of any chemical agents of	
	warfare that are used	
	"because of	

Table III

Some Relevant International Agreements, Religious and Related Documents

Designed to Protect People, Property and Land Against Methods Described in

Table I

Date	Description	Source
	their direct	
	toxic effects on man, animals	
	or plants," including	
	herbicides.	
April 10, 1972	Prohibiting production and	Convention on the Prohibition
(opened for	stockpiling of biological and	of the Development,
signature)	toxic weapons.	Production and Stockpiling of
		Bacteriological (Biological)
		and Toxin Weapons and on
		Their Destruction
		("Biological Weapons
		Convention")
March 26, 1975	Prohibiting production and	Biological Weapons Convention
	stockpiling of biological and	enters into force, including
	toxic weapons.	for the United States.

Table III

Some Relevant International Agreements, Religious and Related Documents Designed to Protect People, Property and Land Against Methods Described in Table I

Date	Description	Source
April 8, 1975	Renouncing, with certain exceptions, first use of herbicides in war.	Exec. Order 11850 (President Ford) Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents
April 10, 1975	Renouncing use of noxious gases and herbicides	1925 Geneva Protocol enters into force for the United States.
Post-1975	Further protective developments.	See, e.g., infra Part XI.C.7., and documents in DOCUMENTS ON THE LAWS OF WAR 407-719 (Adam Roberts & Richard Guelff, eds., 3d ed. 2004 reprint).

XI. Insufficiency of Plaintiffs' International Law Claims

Neither a treaty to which the United States was a party, nor a statute, nor a binding declaration of the United States, nor a rule of international or human rights law applied to limit spraying of herbicides by the United States in Vietnam during the period up to April of 1975. See also *infra* Part XII.

This Part discusses the international law upon which plaintiffs base their claims. Section A sets out the position of the United States on plaintiffs' international law claims. Section B discusses federal statutes of the United States reflecting treaties. Section C discusses operative treaties and other international instruments. Section D discusses customary international law.

During the period described in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 159 L. Ed. 2d 718, 124 S. Ct. 2739 (2004), at the end of the Eighteenth century when our federal government was established, uncodified customary international law may have been relatively more important than it is today. Multinational treaties--as our own early relations with France and England demonstrated--were vital but narrow in scope. In the Twentieth century, codification became the prevalent mode of establishing international law through multilateral treaties, conventions, binding declarations, and the like--often with world-encompassing reach. This development paralleled that in this country where common law waits on statute.

The current problem for United States courts --as well as other branches of the government--in interpreting and applying the vast array of common law practice,

statutes, treaties with individual nations or regional associations, and written provisions embraced by almost all powers, is far different from that posited in*Sosa* of a few uncodified tenets. *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964) ("The greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice . . . .").

A. Position of the Government

The United States has consistently taken the position that no rule of international law barred the use of chemical herbicides during the Vietnam War either to clear brush and leaves or to destroy crops, and that, in any event, the spraying focused only on crops intended to feed enemy forces. The government argues:

> The primary source of the alleged prohibition on the use of chemical herbicides in combat is the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ("1925 Geneva Protocol" or "Protocol"), 26 U.S.T. 571. *See, e.g.*, Am. Compl., ¶¶75-76; Transcript of Hearing March 18, 2004 ("03/18/04 Tr.") at 28. The Protocol, however, was not ratified by the United States until 1975, and thus was not binding upon the United States at the time of the

Vietnam War. The Protocol was based upon the Hague Gas Declaration of 1899, the Versailles Treaty, and the 1922 Washington Treaty on Submarines and Noxious Gases. *See* George Bunn, *Banning Poison Gas and Germ Warfare: Should the United States Agree?*, 1969 Wisc. L. Rev. 375, 375-77. The United States never ratified the first two of these treaties, and the latter never entered into force. *Id.* Thus, until its ratification of the 1925 Geneva Protocol, the "United States [was] not a party to any treaty which expressly prohibit[ted] [sic] it from engaging in gas or bacteriological warfare." Id. at 381. Because the Protocol "is evidence of the customary law norm," John Norton Moore, *Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis*, 58 Va. L. Rev. 419, 450 (1972), however, and because discussion of the issue most often revolved around interpretation of the Protocol, we focus on the disputed scope of the Protocol to demonstrate the absence of any customary international law norm prohibiting the use of chemical herbicides in combat. The scope of any customary international law prohibition is not necessarily the same as the scope of the Protocol. *See* Moore, 58 Va. L. Rev. at 454; R.R. Baxter and Thomas Buergenthal, *Legal Aspects of the Geneva Protocol of 1925*, 64 Am. J. Int'l L. 853, 855-56 (1970).

The Executive Branch has consistently taken the position that the Protocol does not apply to chemical herbicides, and that no other principle of international law prohibited their use in war.

See generally Moore, 58 Va. L. Rev. at 444-47; Baxter & Buergenthal, 64 Am. J. Int'l L. at 864 & n.59 ("The United States has consistently asserted that the use of these weapons did not violate the Protocol."). Thus, as early as 1961, when the use of chemical defoliants was first being considered by President Kennedy, Secretary of State Dean Rusk informed him that "the use of defoliant does not violate any rule of international law concerning chemical warfare and is an accepted tactic of war." Memorandum from Secretary of State Rusk to President Kennedy, Nov. 24, 1961 ("Rusk Memorandum"), reprinted in I Foreign Relations of the United States 1961-1963, Vietnam, 1961, at 663, *available at* <http://www.state.gov/www/about_state/history/vol_i_1961/z.html> (Item 275).

The United States consistently took this position publicly as well. In 1966, the United States Ambassador to the United Nations, James M. Nabrit, Jr., stated to the General Assembly that the 1925 Geneva Protocol does not apply to herbicides. *See* Moore, 58 Va. L. Rev. at 444-45, *citing* United States Arms Control and Disarmament Agency ("ACDA"), 1966 Documents on Disarmament ("1966 Documents on Disarmament") at 800-01. *See also* 1966 Documents on Disarmament at 742-43 (statement to same effect by William C. Foster, ACDA). Indeed, in that same year, notwithstanding the United States' use of herbicides in Vietnam, but consistent with the United States' position that the Protocol does

not prohibit such use, the United States co-sponsored and voted for a General Assembly resolution calling for "strict observance by all States of the principles and objectives of the Geneva Protocol." G.A. Res. 2162(B) (1966), reprinted in 1966 Documents on Disarmament 798-99, quoted in Moore, 58 Va. L. Rev. at 444.

On November 25, 1969 President Nixon announced that he would resubmit the Protocol to the Senate for ratification. The Protocol had previously been submitted to the Senate in 1926, but the Senate agreed to return the unratified Protocol to the Executive pursuant to the Executive's request in 1947. Chemical-Biological Warfare: U.S. Policies and International Effects: Hearings before the Subcomm. on National Security Policy and Scientific Developments, House Comm. on Foreign Affairs ("1969 House Hearings") at 180 (Statement of Thomas R. Pickering, Deputy Director, Bureau of Politico-Military Affairs, Department of State); Baxter & Buergenthal, 64 Am. J. Int'l L. at 855 n.11; 6 Unperfected Treaties of the United States of America, 1776-1976, at 473 (Christian L. Wiktor, ed. 1984). In making this announcement the President again reiterated the Administration's position that the Protocol did not apply to chemical herbicides. *See* 1969 House Hearings at 176-77, 181-83 (Statement of Mr. Pickering). This position was reiterated again when the Protocol was officially transmitted to the Senate for ratification on August 19, 1970. *See* Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of

Bacteriological Methods of Warfare: Message from the President ("President's Message"), S. Exec. J, 91st Cong., 2d Sess., at vi. In the Letter of Submittal attached to the President's Message, Secretary of State Rogers expressly stated that "it is the United States' understanding of the Protocol that it did not prohibit the use in war of . . . chemical herbicides." *Id.*

The Executive consistently reiterated this view throughout the Senate's consideration of the Protocol, and it was this very issue that delayed ratification for an additional five years. Thus, during hearings before the Senate Foreign Relations Committee in 1971, Administration officials repeatedly asserted that the Protocol does not cover chemical herbicides. *See* The Geneva Protocol of 1925: Hearings Before the Senate Comm. on Foreign Relations, 92nd Cong. ("1971 Senate Hearings") at 5-7, 27, 30, 37-38 (Testimony of Secretary of State Rogers), 304-05 (Testimony of G. Warren Nutter, Department of Defense) (1972). Indeed, the Secretary of State indicated that President Nixon would likely reject ratification if the Senate conditioned its advice and consent on an interpretation of the Protocol that covered herbicides. *Id.* at 37-38.

In response to a request from Senator Fulbright during the course of the 1971 Senate Hearings, the General Counsel of the Department of Defense set forth the Department's view that neither "the rules of customary international law," the 1925 Geneva Protocol, nor the Hague

Regulations governing land warfare prohibited the use of "anti-plant chemicals for defoliation or the destruction of crops," provided that the use against crops met certain other criteria, discussed below. Letter from J. Fred Buzhardt, General Counsel for the Department of Defense to J.W. Fulbright, Chairman, Senate Comm. on Foreign Relations ("Buzhardt Letter"), April 5, 1971, reprinted in 1971 Senate Hearings at 315-17, *quoted in* Moore, 58 Va. L. Rev. at 444-45.

The administration reiterated its position that the 1925 Geneva Protocol does not apply to herbicides during hearings before the House of Representatives in the spring of 1974. *See* U.S. Chemical Warfare Policy: Hearings Before the Subcomm. on National Security Policy and Scientific Developments, House Comm. on Foreign Affairs, 93rd Cong. ("1974 House Hearings") at 150 (Statement of Amos Jordan). Moreover, the testimony made clear that "the current interpretation [of the Protocol] was approved by the President" himself. *Id.* at 206 (Testimony of Len Sloss, Deputy Director, Politico-Military Affairs, Department of State).

Finally, in late 1974, President Ford announced that, "with a view to achieving Senate advice and consent to ratification" of the Protocol, he was prepared "in reaffirming the current U.S. understanding of the scope of the Protocol" as not covering herbicides, to renounce, as a matter of "national policy," the first use of herbicides in war, except for use in limited circumstances. *See* Prohibition of Chemical and Biological Weapons:

Hearings Before the Senate Comm. on Foreign Relations, 93rd Cong. ("1974 Senate Hearings") at 12 (1974) (Statement of Fred C. Ickle, Director, ACDA). *See also id.* at 27. On December 16, 1974, the Senate unanimously voted its consent to ratification. 120 Cong. Rec. 40,067-68 (Dec. 16, 1974). On January 22, 1975, President Ford signed the instrument of ratification of the Protocol, and it was deposited with France and entered into force with respect to the United States on April 10, 1975. *See* 26 U.S.T. 571 (1975). Two days earlier, on April 8, 1975, President Ford issued Executive Order 11850 renouncing, as a matter of national policy, the first use of herbicides in war, except in certain limited circumstances. *See* 40 Fed. Reg. 16,187 (April 8, 1975). That action, taken as a matter of policy rather than legal obligation, has no effect on the existence or recognition of any international legal norm governing the use of herbicides in war. Flores v. S. Peru Copper Corp., 343 F.3d 140, 154 (2d Cir. 2003) ("Practices adopted for moral or political reasons, but not out of a sense of legal obligation, do not give rise to rules of customary international law.").

. . . .

Similarly, the United States had long interpreted 1907 Hague Convention Respecting the Laws and Customs of War on Land ("1907 Hague Convention" or "Convention"), 36 Stat. 2277 (1910), and international law generally, as not prohibiting the destruction of crops intended for

use by enemy forces, precisely the type of crop destruction operations undertaken in Vietnam.

. . . .

As noted above, in 1945 the Judge Advocate General of the War Department provided an opinion as to the legality, under international law, of "certain crop-destroying chemicals which can be sprayed by airplane against enemy cultivations." Cramer Opinion, ¶ 1. . . . The Cramer Opinion concluded that "the use of chemical agents . . . to destroy cultivations or retard their growth, would not violate any rule of international law prohibiting poison gas." Cramer Op., ¶3. The Opinion also addressed other possible international law prohibitions on the destruction of enemy crops, including the 1907 Hague Convention . . . . *Id.*, ¶¶4-5.

This same conclusion was reached by the General Counsel of the Department of Defense a quarter-century later . . . . Buzhardt Letter, reprinted at 1971 Senate Hearings at 315-17.

The Army Field Manual took the same position, stating that Article 23(a) "does not prohibit measures taken to . . . destroy, through chemical . . . agents harmless to man, crops intended solely for consumption by the armed forces (if that fact can be determined)." Department of Army Field Manual, FM 27-10, The Law of Land Warfare (July 1956), ¶37, reprinted in Buzhardt Letter. *See also* 1971 Senate Hearings at 315 (discussing Field Manual); 1969 House Hearings at 215

(same).

. . . .

The United States' use of chemical herbicides in Vietnam carefully hewed to this longstanding interpretation of international law. The initial use of chemical herbicides in Vietnam was restricted to defoliation operations. Am. Compl., ¶54-55; William A. Buckingham, Jr., Operation Ranch Hand: The Air Force and Herbicides in Southeast Asia 1961-1971 (Office of Air Force History 1982) ("Operation Ranch Hand") at 21, available at <http://www.airforcehistory.hq.af.mil/Publications/fulltext/operation_ranch_hand.pdf>. After those initial defoliation operations, in 1962 President Kennedy decided to allow restricted crop destruction to proceed. *Id.* at 78; Am. Compl., ¶55. The President's decision was accompanied by instructions that "the targets should be chosen so as to cause the least damage possible to non-Viet Cong farmers." Buckingham, Operation Ranch Hand at 79.

The crop destruction program was thus focused on "crops intended for the use of Vietcong or North Vietnamese forces" in Vietcong-held territory. 1969 House Hearings at 215 (Testimony of Mr. Pickering). *See also id.* at 197 (crop destruction undertaken only after "very thorough review" and "very thorough conclusions" about crops before destruction operations) (Testimony of Mr. Pickering), 229 ("friendly crops" excluded from target areas and

all crop destruction projects approved by Ambassador) (Statement of Adm. Lemos); Buckingham, Operation Ranch Hand at 83. . . .

This same policy of focusing crop destruction on enemy crops continued throughout the war. As explained by Rear Admiral Lemos in 1969:]

> We are really talking about very isolated crops in areas of known Vietcong and North Vietnamese army units, and which are clearly a part of that complex and being used, or being grown by them, or by people forced by them to grow for them.

1969 House Hearings at 250 (Testimony of Adm. Lemos). *See also id.* at 251 ("crop destruction program is associated with enemy camp areas and not the villages and hamlets"). Thus, before crop destruction could be approved, there "had to be substantial evidence that the crops are being grown specifically for the use of Vietcong troops and North Vietnamese troops." *Id. See also* 1971 Senate Hearings at 315 (Testimony of Mr. Nutter). As a result, the crop destruction program was only a small part of the overall use of herbicides in Vietnam. 1969 House Hearings at 250.

In early December 1970, the decision was made to completely phase out the crop destruction program. Buckingham, Operation Ranch Hand at 172; 1971 Senate Hearings at 3 ("immediate termination of all use of chemical herbicides in

> Vietnam for crop destruction purposes") (Statement of Secretary of State Rogers). On January 16, 1971, the Deputy Secretary of Defense ordered the immediate termination of all crop destruction operations by U.S. forces. Buckingham, Operation Ranch Hand at 175.

U.S. Statement of Interest at 4-13 (some footnotes omitted; some moved in whole or in part to text).

As indicated below, history supports the government's view of the law pre-1975. See also *infra* Part XII.

Not persuasive, however, is the government's further argument that the President's decision to use herbicides during the Vietnam War constituted a "controlling executive act" foreclosing customary international law claims. U.S. Statement of Interest at 44-47. The President of the United States has no power to violate international law or to authorize others to do so. The Nuremberg decisions made it clear that a head of state and those responding to his orders are bound by international law. *See supra* Part IX. The fact that a head of state may not be sued for official activities does not provide authorization for others to act illegally under the cloak of his immunization. *See Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994) (addressing head of state immunity).

There was, in any event, no formal act of Congress authorizing a violation of international law during the Vietnam hostilities or covering specifically the area of herbicide use. Had Congress, or perhaps even the President by formal proclamation, occupied this area, the government's contention "that customary

international law is only incorporated into the law of the United States absent a 'controlling executive or legislative act,' *The Paquete Habana,* 175 U.S. 677, 700, 44 L. Ed. 320, 20 S. Ct. 290 (1900)," U.S. Statement of Interest at 45, might have some weight. But there was never a public formal legislative act or presidential proclamation permitting spraying of the kind used in Vietnam.

The government's further contention that the courts should defer to the executive's interpretation of international law, *id.* at 47-49, insofar as it suggests that the executive's statement of the law is controlling, is rejected, even though the courts will often be influenced by the executive's interpretation since its expertise in international law is substantial. *See Kolovrat v. Oregon,* 366 U.S. 187, 194, 6 L. Ed. 2d 218, 81 S. Ct. 922 (1961) (stating, with respect to meaning of treaties, that the government's view is given great weight). Courts cannot abandon their own duty under Article III of the Constitution to decide the law applicable to a case properly before them.

B. Statutes of the United States

Statutes of the United States, based on treaties or other forms of international law, provide a particularly useful source of international law for United States courts. They instance situations where the legislative and executive branches of government agree on what that international law is and agree that we are bound by it. They also obviate the issue of whether a treaty is self-executing. *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmts. h,i (discussing the issue of self-

executing treaties, i.e., "whether existing law is adequate to enable the United States to carry out its obligations, or whether further legislation is required": "Whether an agreement is to be given effect without further legislation is an issue that a court must decide when a party seeks to invoke the agreement as law."). Rules against torture, war crimes and genocide are, apart from treaties and statutes, arguably *jus cogens*, i.e., a peremptory norm. While in particular cases a statute may create a problem by adopting broader or narrower definitions than those reflected in treaties or customary international law, that is not an issue in the instant case.

1. Torture

Plaintiffs rely upon the Torture Victim Protection Act of 1991("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) . It is a federal statute that arguably codifies international law prohibitions against torture and extrajudicial killing. *See id.*, 106 Stat. at 73 (stating, in preamble, that the Act carries out "obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing"); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"), Dec. 10, 1984, 1465 U.N.T.S. 112 (entered into force June 26, 1987).

The TVPA provides:

> An individual who, under actual or apparent authority, or color of law, *of any foreign nation*—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

TVPA, Pub. L. No. 102-256, § 2(a), 106 Stat. at 73 (emphasis added). The TVPA also requires exhaustion of "adequate and available remedies in the place in which the conduct giving rise to the claim occurred," *id.* § 2(b), and provides for a ten-year statute of limitations, *id.* § 2(c) ("Within 10 years after the cause of action arose.").

Section 3 of the TVPA defines extrajudicial killing and torture as follows:

> (a) Extrajudicial killing--For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, *does not, include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.*

(b) Torture--For the purposes of this Act--

(1) the term 'torture' means any act, directed against an individual *in the offender's custody or physical control,* by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is *intentionally inflicted* on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration

> or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Id. § 3, 106 Stat. at 73-74 (emphasis added).

The TVPA by its terms only applies to those acting under the authority of a foreign nation and thus is inapplicable here since plaintiffs allege that the defendants acted in concert with, and by authority of, the United States government.

Plaintiffs also allege that the defendants acted in concert with the South Vietnamese government, but this is a makeweight. Defendants' contracts were with the United States, and until 1971 the United States was calling the tune on the herbicide application of which plaintiffs complain.

The use of herbicides in Vietnam does not fit within the definition of either torture or extrajudicial killing. Plaintiffs were not within the defendants' custody or physical control, nor that of the United States, when herbicides were used. Nor were herbicides used to intentionally inflict pain and suffering. They were used to kill or harm plants.

Another obstacle plaintiffs face is the TVPA's ten-year statute of limitations, which bars any claim under the TVPA that arose prior to January 30, 1994, ten years prior to the date the complaint was filed. *See id.* § 2(c), 106 Stat. at 73; *supra* Part VIII.D.

In addition, the TVPA did not become effective until 1992, long after the activities of which plaintiffs

complain took place. Assuming *arguendo* that plaintiffs rely upon the customary international law prohibition of torture as *jus cogens*, *see Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (recognizing under the ATS, prior to the Convention Against Torture entering into force for the United States and prior to the TVPA's enactment, a cause of action for "an act of torture committed by a state official agent against one held in detention [which] violates established norms of the international law of human rights, and hence the law of nations"), plaintiffs still fail to allege facts that would constitute torture. The TVPA and its counterpart, the Convention Against Torture, has no application in the instant case.

2. War Crimes

Plaintiffs rely on the War Crimes Act of 1996, 18 U.S.C. § 2441 (2000). It provides:

> Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

18 U.S.C. § 2441(a). Subsection (b) provides that the circumstances are that "the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States." 18 U.S.C. § 2441(b). A "war crime" is defined as follows:

> As used in this section the term 'war crime' means any conduct—
>
> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
>
> (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
>
> (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
>
> (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

18 U.S.C. § 2441(c).

Defendants argue that the War Crimes Act creates no private cause of action for civil liability because it is a criminal statute. In *Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995), the Court of Appeals for the Second

Circuit held that the district court had jurisdiction under the ATS over plaintiffs' claims of war crimes and other violations of international humanitarian law. Although *Kadic* predates *Sosa,* the former's reasons for recognizing civil liability for war crimes under the ATS remains sound. The war crimes alleged in *Kadic*--"acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities"--"have long been recognized in international law as violations of the law of war." *Id.* at 242. The defect in plaintiffs' complaint is that the herbicide spraying complained of did not constitute a war crime pre-1975.

With respect to section 2441(c)(1) of title 18 of the United States Code, plaintiffs only rely upon the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; see also *infra* Part XI.C.5. It defines "grave breaches" in relevant part as follows:

> Wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, . . ., and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id. art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388. Herbicide spraying by the United States did not constitute "willful killing" or "wilfully causing great suffering or serious injury to body or health" since the United States lacked the requisite criminal intent. Nor did the spraying constitute "torture," *see supra* Part XI.B.1, or "inhuman treatment," *see* OSCAR M.

UHLER ET AL., GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY 598 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) (noting that the notion of inhuman treatment is not easily definable, but concluding that it refers to "treatment constituting an attack on physical integrity or health" and treatment that injures the victim's human dignity, bringing him "down to the level of [an] animal[]"). As for property damage, any such damage was justified by military necessity and was carried out lawfully. *See infra* Part XI.D.3.

Under section 2441(c)(2), article 23 of the Annex to Hague Convention IV is the only article in that convention that plaintiffs rely upon. Contrary to plaintiffs' claim, herbicide spraying by the United States in Vietnam was not a violation of article 23. *See infra* Part XI.C.1.

In reference to section 2441(c)(3), the United States' spraying of herbicides in Vietnam did not constitute a violation of common article 3 to the 1949 Geneva Conventions. *See infra* Part XI.C.5. Nor was the United States a party to any protocol to the 1949 Geneva Conventions during the relevant period.

As for section 2441(c)(4), it is inapplicable because the United States was not a party to the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices during the relevant period; this protocol did not enter into force for the United States until May 24, 1999.

Even if the War Crimes Act is a reflection of customary

international law either pre-1975 or today, *see infra* Part XI.D.1., the herbicide spraying complained of did not constitute a war crime prior to 1975.

3. Genocide

Plaintiffs argue that defendants' acts constituted genocide but do not specifically rely upon the Genocide Convention Implementation Act of 1987, 18 U.S.C.A. § 1091 (2000 & Supp. 2004). The Act "incorporated" the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951), into federal law. The Genocide Convention Implementation Act reads in relevant part:

> Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group as such—
>
> (1) kills members of that group;
>
> (2) causes serious bodily injury to members of that group;
>
> (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
>
> (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;

> (5) imposes measures intended to prevent births within the group; or
>
> (6) transfers by force children of the group to another group; or attempts to do so, shall be punished as provided in subsection (b).

18 U.S.C.A. § 1091(a). Subsection (d) requires either the commission of the offense within the United States or that the alleged offender be a national of the United States. 18 U.S.C.A. § 1091(d). Subsection (b) specifies punishment, such as imprisonment or a possible fine of up to one million dollars. *See* 18 U.S.C.A. § 1091(b). The Act also provides that there is no statute of limitations for an offense under subsection (a)(1). 18 U.S.C.A. § 1091(e).

Similarly, "genocide" is defined in the Genocide Convention as follows:

> In the present Convention, genocide means any of the following acts committed *with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

Genocide Convention, art. 2, 78 U.N.T.S. at 280 (emphasis added).

The United States did not become a party to the Genocide Convention until November 25, 1988. It attached the following understandings, among others:

> (1) That the term 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such' appearing in article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in article II.
>
> . . .
>
> (4) *That acts in the course of armed conflicts committed without the specific intent required by article II are not sufficient to constitute genocide as defined by this Convention.*

Multilateral Treaties Deposited with the Secretary General (emphasis added), http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp#N26 (last visited Feb. 16, 2005).

Laws against genocide have been expanded--unfortunately with limited effect--in the latter part of the twentieth century. *See generally* HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE (1999); LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION (1991); SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (Perennial 2003); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2d ed. 2001); GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE (New Press 2000); II DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT 1447-48 (1999) (discussing Genocide Convention as a legacy of Nuremberg).

The use of herbicides in Vietnam did not constitute genocide as defined by either the Genocide Convention Implementation Act or the Genocide Convention, particularly with the United States' understanding regarding specific intent. The United States did not use herbicides in Vietnam with the specific intent to destroy any group. Nor were those herbicides designed to harm individuals or to starve a whole population into submission or death. The herbicides were primarily applied to plants in order to protect troops against ambush, not to destroy a people.

C. Treaties and Other International Instruments

1. 1907 Hague Convention IV

Plaintiffs rely upon article 23 of the Regulations Respecting the Laws and Customs of War on Land, the Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land ("Hague Convention IV"). The United States signed the Hague Convention IV on October 18, 1907, and the Senate ratified it on March 10, 1908. Article 23 reads as follows:

> In addition to the prohibitions provided by special Conventions, it is especially forbidden:
>
> (a) *To employ poison or poisoned weapons;*
>
> (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
>
> (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
>
> (d) To declare that no quarter will be given;
>
> (e) *To employ arms, projectiles, or material calculated to cause unnecessary suffering;*
>
> (f) To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
>
> (g) To destroy or seize the enemy's property, unless such destruction or seizure be

imperatively demanded by the necessities of war;

(h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 23, 36 Stat. 2277, 2301-02 (emphasis added) [hereinafter Hague Convention IV]. The only provisions that may be construed as relevant are clauses (a) and (e).

The poisons referenced in clause (a) encompass those applied to specific instruments of warfare such as bullets or bayonets. They do not cover, and have never been interpreted as including, gases or spraying from the air. During World War I both the Germans and the French used poison gas on the assumption that the Hague Convention IV did not apply. The United States was also prepared at the time to use poison gas, but the Armistice made that unnecessary.

Hague Convention IV does not define the phrase "poison or poisoned weapons." The International Court of Justice ("ICJ") has noted that "different interpretations exist" as to what this undefined phrase means. *See* Advisory Opinion No. 95, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, at

248 (July 8). State practice under the treaty indicates that the proscriptions of "poison or poisoned weapons" did not apply even to chemical gas weapons designed and intended to be lethal, such as shells containing chlorine or mustard gas. *See* Anderson Decl. ¶39 (explaining that the Germans, British and French extensively employed such weapons in the years immediately following adoption of Hague Convention IV); Reisman Op. at 30 ("State practice suggests that the 1907 Hague Convention was not intended to apply to poisonous gases.").

The belligerents in World War I, all of whom had ratified Hague Convention IV, thought it necessary later to negotiate a special treaty, the 1925 Geneva Protocol, to outlaw lethal chemical gas weapons. Anderson Decl. ¶39; Reisman Op. at 32. In 1960 a classic treatise on the international law of war and a leading writer on the subject convincingly concluded that Article 23's 1907 prohibition of poison and poisoned weapons did not apply to poisonous gases. *See* Joseph Burns Kelly, *Gas Warfare in International Law,* 9 MIL. L. REV. 1, 44 (1960); Reisman Op. at 29-30 (citing MYRES S. McDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 619 (1960, repr. 1994)).

The United States Army field manual in force throughout the Vietnam War concluded that specific weapons, including chemical weapons, were to be addressed by specific treaties and not by general prohibitions such as Article 23. Anderson Decl. ¶38. Inasmuch as Hague Convention IV's ban on "poison or poisoned weapons" does not apply to chemical gas weapons designed and intended to kill humans, *a*

fortiori it does not prohibit military use of herbicides designed and intended as defoliants. See also *supra* Part X for traditional abhorrence of poison tipped or impregnated munitions used in war, and *supra* Part IV.B.3. for definition of poison.

Even if the terms "poison or poisoned weapons" could be construed more broadly to encompass poisonous gases, this broader definition still would not reach herbicides, regardless of whether they have collateral harmful consequences for humans. Rather, this proscription would reach only those materials that were intentionally designed "to inflict poisoning as a means of combat." STEFAN OETER, *Methods and Means of Combat, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 105, 149 (Dieter Fleck ed., 1995). "If the asphyxiating or poisoning effect is merely a side-effect of a physical mechanism intended principally to cause totally different results . . ., then the relevant munition does not constitute a 'poisonous gas.'" *Id.* Thus, chemicals designed and used as herbicides to kill plants, as defendants' products were designed and used during the Vietnam War, are not outlawed as "poison or poisonous weapons" under even the broadest interpretation of that phrase.

Under *Sosa,* the imprecise scope of the Hague Convention IV's prohibition on the use of "poison or poisoned weapons," and the uncertainty as to whether that prohibition even applies to lethal chemical weapons designed to kill human beings, is fatal to any claim that the Convention sets forth a sufficiently definite prohibition on military use of herbicides that could be enforced in United States courts. By contrast, the "18th-century paradigms" the Court identified in *Sosa,*

124 S. Ct. at 2755-57, 2761-62, were offenses specified in great detail by the treatise writers of the day. Blackstone, whose treatise the Court cites, *id.* at 2756, defined piracy as, among other things: "any commander . . . betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods; or yielding them up voluntarily to a pirate; . . . or any person confining the commander of a vessel, to hinder him from fighting in the defense of his ship, or to cause a revolt on board;" or "trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose." 4 William Blackstone, Commentaries on the Laws of England 72 (1769). Unlike the "18th century paradigms," Hague Convention IV's proscription of "poison or poisoned weapons" does not establish a specific and definite prohibition on military use of herbicides, and thus it cannot be the source of an actionable norm prohibiting such use.

Plaintiffs argue that herbicides are *per se* proscribed materials that are "calculated to cause unnecessary suffering." *See* Hague Convention IV, art. 23(e), 36 Stat. at 2302. The prohibition has long been understood to apply to weapons that cause unnecessary or superfluous injury to an already incapacitated combatant. Anderson Decl. ¶47 (citing, as an example, bullets treated with an agent that inflames a wound). It does not apply to lethal weapons that collaterally cause injury or suffering in order to achieve an appropriate (in war) military objective of incapacitating enemy troops, let alone to herbicides that *may* cause harm to humans beings as the side-effect of an application intended to destroy plants. As a leading treatise explains, Article 23's prohibition of weapons "calculated to cause unnecessary suffering" is:

> too vague to produce by itself a great many practical results. Apart from cases in which states expressly agree to forbid employment of a specified weapon . . ., states have not been known to lightly decide unilaterally to discard a weapon, once introduced into their arsenals, because it is considered to cause unnecessary suffering.

FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 41-42 (3d ed. 2001), http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0793/$ File/ICRC_002_0793.PDF!Open. This norm is too indeterminate to be actionable under *Sosa*.

Clause (e) is not applicable because the herbicides were not "calculated to cause unnecessary suffering." The herbicide spraying was in the course of armed activities deemed necessary by the United States to protect American armed forces and those of its allies. It was not designed to harm people or land independently as a punishment or to inflict hurt viciously and consciously.

The Reisman opinion submitted in support of defendants' motion to dismiss is sound. He wrote:

> Some scholars, such as [Wil D.] Verewey, [RIOT CONTROL AGENTS AND HERBICIDES IN WAR[;] THEIR HUMANITARIAN, TOXICOLOGICAL, ECOLOGICAL, MILITARY, POLEMOLOGICAL, AND LEGAL ASPECTS (1977),] and the collective authors of the Stockholm International Peace

> Research Institute, [THE PROBLEM OF CHEMICAL AND BIOLOGICAL WARFARE, VOL. III: CBW AND THE LAW OF WAR (1973),], have labored mightily to establish that Article 23(a) of the Hague Conventions related to herbicides. On all the evidence, this is, in my opinion, incorrect. Herbicides were unknown at the time of the drafting of the provisions under discussion and, for that reason, could not have been an explicit target of the provision.

Reisman Op. at 29; *see also* R. R. Baxter & Thomas Buergenthal, *Legal Aspects of the Geneva Protocol of 1925*, 64 AM. J. INT'L L. 853, 853-54 (1970) (speaking in 1969 of ratification of the 1925 Geneva Protocol, that "it is less clear to what extent [the customary international law prohibition of the use in war of lethal chemical and biological weapons] . . . outlaws the use of . . . herbicides").

Hague Convention IV does not provide a basis for recognizing a common law cause of action against defendants for manufacturing and selling herbicides for military use during the Vietnam War. The Convention did not outlaw the use of herbicides in Vietnam.

2. 1925 Geneva Protocol

Plaintiffs rely upon the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 ("1925 Geneva Protocol"). The 1925 Geneva Protocol entered into force for the United States on April 10, 1975. See also *infra* Part XII discussing

events concurrent with ratification of the 1925 Geneva Protocol. The ratification document reads as follows:

> BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
>
> A PROCLAMATION
>
> CONSIDERING THAT:
>
> The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was signed at Geneva on June 17, 1925, the certified text of which, in the English and French languages, is hereto annexed;
>
> The Senate of the United States of America by its resolution of December 16, 1974, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Protocol subject to a reservation as follows:
>
> > "That the said Protocol shall cease to be binding on the Government of the United States with respect to the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials, or devices, in regard to an enemy State if such State or any of its allies fails to respect the prohibitions laid down in the Protocol.";
>
> The President of the United States of America on January 22, 1975, ratified the Protocol, subject

to the aforesaid reservation, in pursuance of the advice and consent of the Senate, and the United States of America deposited its instrument of ratification with the Government of the French Republic on April 10, 1975;

Pursuant to the provisions of the Protocol, the Protocol entered into force for the United States of America on April 10, 1975;

NOW, THEREFORE, I, Gerald R. Ford, President of the United States of America, proclaim and make public the Protocol, to the end that it shall be observed and fulfilled with good faith on and after April 10, 1975, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-ninth day of April in the year of our Lord one thousand nine hundred seventy-five and of the independence of the United States of America the one hundred ninety-ninth.

. . . .

PROTOCOL

for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other

Gases, and of Bacteriological Methods of Warfare

THE UNDERSIGNED PLENIPOTENTIARIES, in the name of their respective Governments:

WHEREAS the use in war of *asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices,* has been justly condemned by the general opinion of the civilized world; and

WHEREAS the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and

TO THE END that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

DECLARE:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, *agree to extend this prohibition to the use of bacteriological methods of warfare* and agree to be bound as between themselves according to the terms of this declaration.

Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 571-

75 (emphasis added). Neither the ratification document nor the protocol references herbicides even though President Ford by separate almost simultaneous executive order included herbicide limitations. *See infra* Part XII.A.

The 1925 Geneva Protocol prohibits "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, material or devices." 26 U.S.T. at 575. This proscription--whether based on the protocol or the customary international law that hypothetically could have developed from it--did not prohibit military use of herbicides at the time of the Vietnam War. See *supra* Part VIII.G. on non-retroactivity. Even if it arguably had, the proscription would not be sufficiently "definite" and "universal" to be among the limited set of temporally operative international legal norms that are actionable under *Sosa*.

As leading scholars have pointed out, the 1925 Geneva Protocol's prohibition on use of "asphyxiating, poisonous or other gases" and "analogous liquids, materials or devices" leaves "considerable room for divergent interpretations." DOCUMENTS ON THE LAWS OF WAR 155 (Adam Roberts & Richard Guelff, eds., 3d ed. 2004 reprint). *See generally* Jill M. Sheldon, Note, *Nuclear Weapons and the Laws of War: Does Customary International Law Prohibit the Use of Nuclear Weapons in All Circumstances?*, 20 FORDHAM INT'L L.J. 181, 220-21 (1996) (stating that the 1925 Geneva Protocol "provoked controversy because the drafters did not *specify* the chemical, biological, or other poisonous gases subject to the protocol's prohibitions. Based on the language banning 'other' gases, some states claimed that it was unclear

whether the Geneva Gas Protocol prohibited tear gas, other non-lethal gases, *or herbicides*." (footnote omitted) (emphasis added)).

The 1925 Geneva Protocol has given rise to a customary international legal prohibition on first use of lethal gas weapons, such as those used during World War I. Anderson Decl. ¶39. At the time of the Vietnam War, however, this prohibition was, for the United States--a non-party--merely a rule predicated on reciprocity, not on customary international law. *See* Reisman Op. at 35-36. It did not, in any event, encompass military use of herbicides. *See* Anderson Decl. ¶49. There is "no indication that the 1925 [Geneva] Protocol was designed to encompass herbicides." *See* Reisman Op. at 34. The "*travaux preparatoires* are silent on this exact point." *Id.; see also* Anderson Decl. ¶54. The French text of the Protocol, which is as authentic as the English text, supports the restrictive view that the prohibition extended only to gases deployed for their asphyxiating or toxic effects on man, not to herbicides designed to affect plants, that may have unintended harmful side-effects on people. Reisman Op. at 34.

National practice supports this restrictive reading. The British military used herbicides chemically similar to Agent Orange in the 1950s during the Malayan Emergency, to deprive enemy guerrilla fighters of their crops. *See* WILLIAM A. BUCKINGHAM, JR., *OPERATION RANCH HAND: THE AIR FORCE AND HERBICIDES IN SOUTHEAST ASIA* 1961-1971, at 4-5 (1982), http://www.airforcehistory.hq.af.mil/Publications/fulltext/operation ranch hand.pdf. The United States considered British precedent in deciding that the use of

defoliants was a legally accepted tactic of war. Secretary of State Dean Rusk advised President John F. Kennedy that herbicide use in Vietnam would be lawful, because "precedent has been established by the British . . . in Malaya in their use of helicopters for destroying crops by chemical spraying." Memorandum of Secretary of State Dean Rusk to President John F. Kennedy (Nov. 24, 1961), *reprinted in* 1 FOREIGN RELATIONS OF THE UNITED STATES, 1961-1963, VIETNAM 1961, at 663, 663 (1988), *available at* http://www.state.gov/www/about_state/history/vol_i_1961/z.html.

As the Court of Appeals for the Second Circuit explained, "it is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States and/or other prominent players in the community of States could be deemed to qualify as a *bona fide* customary international law principle." *United States v. Yousef*, 327 F.3d 56, 92 n.25 (2d Cir. 2003), *cert. denied*, 540 U.S. 933 (2003); *see also* Reisman Op. at 36 (opining that United States' use of herbicides during the Vietnam War "restricted the transformation of the 1925 [Geneva] Protocol into customary international law"); *cf. Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 164 (2d Cir. 2003) (concluding that the American Convention on Human Rights could not be the source of a legally binding norm where the United States, a primary nation in the region, declined to ratify it).

The numerous reservations made by many nations in acceding to the treaty demonstrate that the Protocol's prohibitions, whatever their precise scope, were not

compelled by customary international law. Reisman Op. at 35-37. As of the time of the Vietnam War, nineteen ratifying states considered themselves bound only in relation to other ratifying states, and declared that they would not be bound if any enemy state failed to respect the prohibition. *Id.* at 35-36. Thus, whatever the scope of the norm that ultimately developed post-1975 from the 1925 Geneva Protocol, during the Vietnam War it applied only to first use of proscribed gases as a matter of reciprocity, not international legal obligation. *Id.*

The 1925 Geneva Protocol provision was designed to outlaw poison gases such as mustard gas used in World War I. It cannot be interpreted to encompass the use of herbicides which were not then a known weapon and were far different in their purpose and effect. The gases outlawed in 1925 had an almost immediate disabling effect on those exposed and were intended to disable or kill human beings. In contrast, herbicides were designed to strip plants of leaves or kill them.

3. 1945 London Charter

Plaintiffs rely on the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 ("1945 London Charter"), that was signed by the United States and its allies. It provided for the establishment of an International Military Tribunal to try Nazi war criminals. It is not the source of any norm that outlawed use of herbicides in the Vietnam War. The 1945 London Charter included broad mandates to treat as a war crime the "wanton destruction of cities, towns or villages, or devastation *not justified by*

military necessity." Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(b), 59 Stat. 1546, 1547, 82 U.N.T.S. 280 (emphasis added). Like the 1949 Geneva Conventions, none of the Charter's provisions proscribed use of any particular weapons. To the contrary, the concept of "military necessity" applies only to the use of legal weapons; weapons that are per se illegal cannot be used at all and claims of military necessity cannot justify their use. Herbicide use was not illegal; it had not even been widely considered for use in war up to that time.

The central provisions of the 1945 London Charter relevant to the instant case are as follows:

> II. Jurisdiction and General Principles
>
> Article 6.
>
> The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging

of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: violation of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(C) CRIMES AGAINST HUMANITY: namely, *murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population,* before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts

performed by any persons in execution of such plan.

Article 7.

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8.

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Charter of the International Miliary Tribunal, Aug. 8, 1945, arts. 6-8, 59 Stat. 1546, 1547 (emphasis added). None of these provisions can be construed to cover use of herbicides in Vietnam.

4. United Nations Charter

Plaintiffs rely upon the United Nations Charter. It establishes the structure of the United Nations. It is not the source of a binding norm prohibiting use of herbicides. *See Tel-Oren v. Libyan Arab Republic*, 233 U.S. App. D.C. 384, 726 F.2d 774, 809 (D.C. Cir. 1984) (per curiam) (Bork, J., concurring) (noting that Articles 1 and 2 of the U.N. Charter are not self-executing and, moreover, "contain general 'purposes and principles,' some of which state mere aspirations and none of which

can sensibly be thought to have been intended to be judicially enforceable"). Nor is the United Nations Charter self-executing. *E.g., Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 157 n.24 (2d Cir. 2003) (noting that the United Nations Charter is not self-executing and citing cases). There is nothing in the United Nations Charter outlawing the use of herbicides in Vietnam.

5. 1949 Geneva Conventions

The four 1949 Geneva Conventions address a host of humanitarian concerns arising during war, such as the treatment of children, women, the sick and wounded; the protection of hospitals; evacuations of civilian populations; the treatment of refugees; the protection of relief agencies; and prevention of forced labor. None of these provisions address the type of weapons that may be used in warfare, let alone military use of herbicides. *See Flores*, 343 F.3d at 165 (stating that a convention addressing environmental pollution could not be the source of a binding norm because it did "not attempt to set [pollution] parameters or regulate it, *let alone to proscribe it*" (emphasis added)).

Plaintiffs rely upon the 1949 Geneva Convention to Protect Civilian Persons in Time of War. It entered into force for the United State on February 2, 1956. It bears no relation to use of herbicides during the Vietnam War. The Convention was designed to protect civilians from harsh acts such as mutilation during and following war. Article 3, its central provision, reads:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each

Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular *murder of all kinds, mutilation, cruel treatment and torture;*

(b) taking of hostages;

(c) *outrages upon personal dignity,* in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are

> recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 3518, 3520, 75 U.N.T.S. 287, 288, 290 (entered into force Oct. 21, 1950) (emphasis added).

The unfortunate indirect effect of shelling or other specifically non-outlawed activities of armed forces operating within rational and proportional limits in offensive or defensive action against the enemy is a risk of war not outlawed by this convention. *See id.* arts. 13-19 (addressing protection of populations against certain consequences of war). The only reservation the United States made upon ratifying the Convention addressed the death penalty; it is not relevant here.

The 1949 Geneva Conventions' "very general" proscriptions, *see Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978), are not the source of a norm that bars military use of herbicides with "a specificity comparable to the features of the 18th century paradigms" of piracy, violations of safe conducts, and infringements of the rights of ambassadors--all of which were clearly defined offenses against the law of nations as described by leading treatise writers of the time. *See*

Sosa, 124 S. Ct. at 2755-57; *see also id.* at 2761-62.

6. 1969 United Nations General Assembly Resolution

Plaintiffs rely upon a 1969 resolution of the General Assembly of the United Nation. It condemned the use of herbicides in Vietnam, reading:

> Question of Chemical and Bacteriological (Biological) Weapons
>
> A
>
> The General Assembly
>
> *Considering* that chemical and biological methods of warfare have always been viewed with horror and been justly condemned by the international community,
>
> *Considering* that these methods of warfare are inherently reprehensible because their *effects are often uncontrolled and unpredictable and may be injurious without distinction to combatants and non-combatants*, and because any use of such methods would entail a serious risk of escalation,
>
> *Recalling* that successive international instruments have prohibited or sought to prevent the use of such methods of warfare,
>
> *Noting specifically* in this regard that:
>
> (a) The majority of States then in existence adhered to the Protocol for the Prohibition of the

Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925,

(b) Since then, further States have become parties to that Protocol,

(c) Still other States have declared that they will abide by its principles and objectives,

(d) These principles and objectives have commanded broad respect in the practice of States,

(e) The General Assembly, without any dissenting vote, has called for the strict observance by all States of the principles and objectives of the Geneva Protocol,

Recognizing therefore, in the light of all the above circumstances, that the Geneva Protocol embodies the generally recognized rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical developments,

Mindful of the report of the Secretary-General, prepared with the assistance of the Group of Consultant Experts, appointed by him under General Assembly resolution 2454 A (XXIII) of 20 December 1968, and entitled *Chemical and Bacteriological (Biological) Weapons and the Effects of Their Possible Use.*

Considering that this report and the foreword to it by the Secretary-General add further urgency for an affirmation of these rules and for dispelling, for the future, any uncertainty as to their scope and, by such affirmation, to assure the effectiveness of the rules and to enable all States to demonstrate their determination to comply with them.

Declares as contrary to the generally recognized rules of international law, as embodied in the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, the use in international armed conflicts of:

(a) Any chemical agents of warfare -- chemical substances whether gaseous, liquid or solid -- which might be employed because of their *direct toxic effects on man, animals or plants;*

(b) Any biological agents of warfare -- living organisms, whatever their nature, or infective material derived from them -- which are intended to cause disease or death in many, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked.

G.A. Res. 2603-A, U.N. GAOR, 24th Sess., 1836th plen. mtg. at 16 (1969) (emphasis added).

Plaintiffs argue that Resolution 2603-A "evidences the opinion of a great majority of nations that the use in

war of chemicals of any kind because of their toxicity to plants was a violation of customary international law at the time." Pls.' Mem. of Law in Opp'n. to Defs.' Mot. at 147.

General Assembly Resolution 2603-A does not provide a basis for plaintiffs' causes of action. The General Assembly is not a law-making body, and--with narrow, defined exceptions not relevant here--is granted only recommendatory powers by the United Nations Charter. *See* U.N. CHARTER arts. 10-11; *see also* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 269 (Bruno Simma ed., 2d ed. 2002). As the Court of Appeals for the Second Circuit has explained, "General Assembly resolutions and declarations do not have the power to bind member States because the member States specifically denied the General Assembly that power after extensively considering the issue . . . ." *Flores v. S. Peru Copper Corp.* 343 F.3d 140, 165 (2d Cir. 2003).

This General Assembly resolution did not constitute a statement of applicable international law, nor was it binding on the United States. *But cf.* BASIC DOCUMENTS ON HUMAN RIGHTS 1 (Ian Brownlie, ed., 3d ed. 1998 reprint) ("The [United Nations], and especially the General Assembly and the Economic and Social Council, has given impetus to the development of standards concerning human rights."). It is the Security Council, not the General Assembly, that holds whatever powers the United Nations has to make decisions that are binding on the United States. The General Assembly's resolution on a subject such as the present one is, while important as an indication of the

developing international law, precatory only. *See, e.g.*, U.N. CHARTER arts. 9-22.

The General Assembly's limited powers with respect to the formulation of international law are illustrated by the following United Nations Charter provisions:

> Article 10
>
> The General Assembly *may discuss* any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided by Article 12, *may make recommendations* to the Members of the United Nations or to the Security Council or to both on any such questions or matters.
>
> Article 11
>
> 1. The General Assembly *may consider* the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and *may make recommendations* with regard to such principles to the Members or to the Security Council or to both.
>
> 2. The General Assembly *may discuss* any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations or by the Security Council, or by a state which is not a

> Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, *may make recommendations* with regard to any such questions to the state or states concerned or to the Security Council or to both. *Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.*
>
> 3. *The General Assembly may call the attention of the Security Council to situations* which are likely to endanger international peace and security.

U.N. CHARTER arts. 10-11 (emphasis added).

By contrast, the Security Council exercises both legislative and executive powers. As Article 24 and 25 of the Charter put the matter:

> Article 24
>
> 1. In order to ensure prompt and effective action by the United Nations, its Members confer on the *Security Council primary responsibility for the maintenance of international peace and security*, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
>
> 2. In discharging these duties the *Security Council shall act* in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security

> Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
>
> 3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.
>
> Article 25
>
> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

U.N. CHARTER arts. 24-25 (emphasis added). Whether or not the Security Council would have considered or would have had the power to consider adoption of Resolution 2603-A, given the veto power of the United States in the Security Council, it can be stated with some assurance that the Security Council would not have taken the same position as the General Assembly had the resolution been presented to it.

A General Assembly resolution, even though it is not binding, *Flores*, 343 F.3d at 166-67, may provide some evidence of customary international law when it is unanimous (or nearly so) and reflective of actual state practice. General Assembly Resolution 2603-A was neither near unanimous nor a reflection of practice. The resolution was adopted by a vote of 80-3, with thirty-six countries abstaining. Anderson Decl. ¶55. Of the eighty nations that voted in favor of the resolution, only forty-one were parties to the 1925 Protocol. Anderson Decl. ¶57. The United States, one of the world's largest military powers, voted against the resolution, as did Australia (a U.S. military ally in Vietnam) and

Portugal. Anderson Decl. ¶55. By abstaining, approximately one-third of the nations addressing the question in effect refused to recognize the existence of a treaty or customary international legal prohibition on military use of herbicides. Anderson Decl. ¶57. It is possible, of course, that, apart from the merits, the abstainers had political reasons for not contesting the position of the United States, but, nevertheless, their failure to support the resolution drains it even of precatory force.

Abstaining states included France, the United Kingdom, Denmark, Norway, the Netherlands, and Turkey (almost all the leading NATO allies of the United States), as well as Japan, China, Thailand, Malaysia, Singapore, and Laos (leading Asian countries as well as jungle-covered countries that might expect to be affected by herbicides in war). Anderson Decl. ¶57. The fact that a third of all voting nations did not then recognize a prohibition on military use of herbicides suggests that there was no such international legal norm during the Vietnam War. *See also* Reisman Op. at 51 ("It is clear that, although some states spoke strongly against the use of herbicides, there was no consensus."); *cf. Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, 17 I.L.M. 1, 29 (1978) (finding General Assembly resolution was not evidence of international law in light of abstentions and negative votes); THE LAWS OF ARMED CONFLICTS 125 (Dietrich Schindler & Jiri Tomans, eds., 3d ed. 1988) (suggesting that the fact that resolution 2603-A is not recited in later General Assembly resolutions regarding chemical and biological weapons indicates "a certain reserve ... in regard to it").

The General Assembly was not expressing generally accepted international law in its 1969 resolution on use of herbicides. Major military powers and more than forty other nations either opposed the resolution or abstained. It cannot be viewed as a statement of consensus.

7. Environmental Law

Plaintiffs rely upon international environmental law norms. They cite no international convention or instrument that solely and specifically addresses environmental law relevant to the legality of herbicide use during war up to 1975. Nonetheless, it is useful to examine treaties that became effective post-1975 to assess whether a rule that outlawed the use of herbicides in Vietnam may have come into existence prior to that time.

No treaty or custom affecting environmental protection created a rule effective before 1975 making illegal the use of herbicides as used in Vietnam. *Cf.* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 234 (2004) (indicating that "complex multinational arrangements and understandings [are] necessary for the next generation of international environmental law"). Limited collateral harm to the environment could be justified by the need to provide appropriate defense to soldiers at war. *Cf., e.g.*, Andrew D. McClintock, Comment, *The Law of War: Coalition Attacks on Iraqi Chemical and Biological Weapon Storage and Production Facilities*, 7 EMORY INT'L L. REV. 633, 682 (1993) ("[A] commander would not be expected to sacrifice a soldier to save a tree." (internal quotation

marks omitted)). International environmental law did not bar the use of herbicides in Vietnam.

Standards were just beginning to evolve in 1975. *See, e.g.*, Frank P. Grad, *Article 12--Right to Health, in* U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 206, 217-35 (Hurst Hannum & Dana D. Fischer, eds., 1993) (discussing environmental protection and hygiene); John Alan Cohan, *Modes of Warfare and Evolving Standards of Environmental Protection Under the International Law of War*, 15 FL. J. INT'L L. 481 (2003); Florencio J. Yuzon, *Deliberate Environmental Modification Through the Use of Chemical and Biological Weapons; "Greening" the International Laws of Armed Conflict to Establish an Environmentally Protective Regime*, 11 AM. U. J. INT'L L. & POL'Y 793 (1996). The United Nations Conference on the Human Environment held at Stockholm in June, 1972 did foreshadow the 1977 convention; it dealt with world-wide environmental problems in a much broader context than war. It was a warning and planning document rather than a ruling on international law. *See* Report of the U.N. Conference on the Human Environment, June 5-16, 1972, U.N. Doc. A/CONF. 48/14 and Corr. 1 (1972).
i

There has been an increasing emphasis on environmental effects of national policies as reflected in the introductory note to the Law of Environment chapter in the Restatement (Third) of the Foreign Relations Law of the United States. *See also, e.g.*, James C. Duncan, *A Primer on the Employment of Non-Lethal Weapons*, 45 NAVAL L. REV. 1 (1998);

Beth Gammie, *Human Rights Implications of the Export of Banned Pesticides*, 25 SETON HALL L. REV. 558 (1994); Aaron Schwabach, *Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 1 (2004); *cf.* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 145 (2004) (stating that there were 215 environmental treaties and about one thousand international environmental agreements by 1999).

The introductory note to the Law of the Environment chapter of Restatement (Third) of Foreign Relations Law of the United States primarily reflects the situation post-1975. It does not support the imposition of civil liability for the use of herbicides in Vietnam prior to 1975. In part it reads:

> Since the Second World War, the growth of population, the spread of industrialization, and the increase in automobile, air, and maritime traffic have led to a great increase in pollution of land, air, and water. It soon became obvious that unilateral action by states to control pollution was not sufficient, and that international cooperation and regulation to protect the environment were necessary. Strong impetus to the development of international environmental law was given by the Conference on the Human Environment, held in Stockholm in 1972. That Conference adopted the Stockholm Declaration on the Human Environment and an Action Plan. .
>
> .

This Part addresses primarily transfrontier and marine pollution . . . .

Environmental harm may be caused by activities other than pollution: a dam may cause erosion, or irrigation may increase the salinity of a river. Other *environmental problems of international concern include* the need to improve habitat and human settlements; to protect archaeologic treasures, cultural monuments, nature sanctuaries, endangered fauna and flora, and migratory birds; to lessen the consequences of *deforestation*, overfishing, and weather modification. Where activities in one state cause environmental injuries in another state, the principles of this Part generally apply.

Sources of environmental law. The principles discussed in this Part are rooted in customary international law. They originated in rules relating to the responsibility of a state for injuries caused to another state or to its property, or to persons within another state's territory or their property. The International Court of Justice has noted that one of the "general and well-recognized principles" of international law is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." The United Nations Survey of International Law[, published in 1948,] concluded that "there has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international

law."

. . . .

In recent years many international agreements have dealt with regional transfrontier pollution. Important guidelines on several aspects of such problems have been adopted, by consensus, by the Organization for Economic Co-operation and Development (OECD).

Marine pollution, International law has established a special regime for marine pollution because of the interdependent character of ocean waters (and air) and the cumulative effect of acts of pollution. . . .

In addition to the provisions in the Law of the Sea Convention, there are numerous international conventions on the protection of the marine environment, both global and regional (see § 603, Reporters' Notes 2-5, and § 604, Reporters' Note 1), and several bilateral agreements (see § 604, Reporters' Note 1).

United States law. International aspects of environmental problems, especially of marine pollution, have been the subject of United States legislation. See, *e.g.*, the Acts relating, respectively, to National Environmental Policy, Clean Air, Federal Water Pollution Control, Toxic Substances Control, Oil Pollution, Ocean Dumping, Deepwater Ports, Rivers and Harbors, Coastal Zone Management, Outer Continental Shelf Lands, Submerged Lands, Fishery

Conservation and Management, Deep Seabed Hard Mineral Resources, Resources Conservation and Recovery, Marine Mammals, Endangered Species, and Marine Sanctuaries.

2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, introductory note to pt. VI, at 99-103 (footnotes omitted) (emphasis added).

None of the international environmental protection activities described in the Restatement's introductory note address the use of the herbicides to protect and prosecute military activity as in Vietnam. No environmental rights or international human rights fixed and known in international law was applicable up to 1975.

In the developing area of international environmental law, the United States and other nations have tended to treat protection of the environment on an ad-hoc, situation-by-situation and case-by-case basis. *See, e.g.*, Matthew Preusch, *Pollution Dispute in Northwest Straddles the Border*, N.Y. TIMES, Mar. 20, 2004, at A8 (discussing reprise of environmental damage by Canadian Corporation to United States and award of damages); Trail Smelter Arbitral Tribunal (U.S. v. Can.) (Apr. 16, 1938), 33 AM J. INT'L L. 182 (1939) (addressing damage to U.S. state by Canadian smelter's fumes); Trail Smelter Arbitral Tribunal (U.S. v. Can.) (Mar. 11, 1941), 35 AM. J. INT'L L. 684 (1941). Such specific activities as protection of whales, endangered species and historical materials as well as protection against world-wide warming because of human

activities furnish no basis for a general rule upon which plaintiffs can rely.

Treaties limiting environmental damage in warfare were not in effect during the period of 1961-1975. The United States did not violate any such provision, defendants could not be held liable under them and plaintiffs could not state a claim under them. The United States signed Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978), on December 12, 1977, but never ratified it. *See* United Nations Treaty Series - Documents Summary: Protocol I, http://157.150.195.4/LibertyIMS::/sidyINug3UAB18PFTU3/Cmd%3D%24%24AB68y%5FePB047bF%3BC3g8HS%3D%23kp%3B6Vf%3DE4Gq%3BQ7ff%3Dq%3B6aDTa%3DlJRJtdSr%5FHtx5hIZfrZhwG%2DoO. While it might be interpreted to apply to future use of herbicides in the way they were used in Vietnam, it had no application prior to 1975.

Article 35(3) of Protocol I provides:

> It is prohibited to employ methods or means of warfare which are intended or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Protocol I, art. 35(3), 1125 U.N.T.S. at 21. Article 55(1) provides:

> Care shall be taken in warfare to protect the natural environment against widespread, long-

> term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended to or may be expected to cause such damage to the natural environment and thereby to prejudice the health and survival of the population.

Id. art. 55, 1125 U.N.T.S. at 28.

It was not until after the conclusion of the Vietnam War that Protocol I articulated for the first time an obligation to take care in warfare "to protect the natural environment against widespread, long-term and severe damages." *Id.* The explicit recognition only in the late 1970s that this was a new obligation (one which the United States has yet to acknowledge) adds some weight to the conclusion that military use of herbicides did not violate customary international law during the Vietnam War. Anderson Decl. ¶¶62-63. Treatise writers remain uncertain whether, even today, customary international law prohibits military use of herbicides when arguably appropriate as an aspect of proportional military force protection. *Id.* ¶60.

The International Court of Justice, the principal judicial organ of the United Nations, has suggested in an advisory opinion that articles 35(3) and 55 of Protocol I do not constitute customary international law that is binding on non-signatories. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 242 (July 8) ("[Article 35, paragraph 3, and article 55 of Protocol 1] are powerful constraints for all the States having *subscribed* to these provisions." (emphasis added)).

The Convention on the Prohibition of Military or Any

Other Hostile Use of Environmental Modification Techniques entered into force on October 5, 1978. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 31 U.S.T. 333, 1108 U.N.T.S. 151. The United States did not sign it until May 18, 1977 and it did not come into force for the United States until January 17, 1980. Multilateral Treaties Deposited with the Secretary-General, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVI/treaty1.asp. Article I prohibited "hostile use of environmental modification techniques having widespread long-lasting or severe effects as the means of destruction, damage or injury to any other party state." Neither Vietnam nor the United States was a party to the Convention when herbicide use stopped. The strong international condemnation of Iraq's fouling of the air by burning oil wells and of the sea by releasing oil during the 1991 Gulf War occurred after 1978.

D. Customary International Law

1. Generally

Plaintiffs rely upon customary international law to support their claims. It is unavailing.

Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2); *see also* Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 1060 (entered into force Oct. 24,

1945) (providing that international custom is "evidence of general practice accepted as law"); *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 154 (2d Cir. 2003) ("In order for a principle to become part of customary international law, States must universally abide by it.").

In order for a practice of states to become customary international law, states must appear to follow the practice due to *opinio juris*, or a sense of legal obligation. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c; *see also Flores*, 343 F.3d at 154 ("[A] principle is only incorporated into customary international law if States accede to it out of a sense of legal obligation. . . . Practices adopted for moral or political reasons, but not out of a sense of legal obligation, do not give rise to rules of customary international law." (citations omitted)). A practice that states initially follow "as a matter of courtesy or habit" may later transform into a rule of customary international law if states generally come to believe that compliance with that practice is a legal obligation. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c. *Opinio juris* may be inferred from acts or omissions, as well as from explicit evidence such as official statements. *Id.*

Customary international law is binding upon all states, even in the absence of a particular state's consent, but may be modified within a state by subsequent legislation or a treaty, provided that the customary international law was not a peremptory norm *(jus cogens)*. *Id.* § 102 cmts. j, k; *id.* § 115(1)(a) ("An act of Congress supersedes an earlier rule of international law

. . . as law of the United States if the purpose of the act to supersede the earlier rule . . . is clear or if the act and the earlier rule . . . cannot be fairly reconciled."). A peremptory norm, which by definition permits no derogation, prevails over and invalidates any prior conflicting international agreements or other rules of international law, and "can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344 (entered into force Jan. 27, 1980); 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k.

A guide for determining proper sources of international law is the Statute of the International Court of Justice ("ICJ Statute"), to which the United States is a party. *Flores*, 343 F.3d at 140. Article 38(1) of the ICJ Statute reads:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial

> decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Statute of the International Court of Justice, *supra*, art. 38(1), 59 Stat. at 1060. Article 59 provides that "the decision of the [International] Court [of Justice] has no binding force except between the parties and in respect of that particular case." *Id.* art. 59.

Article 38(1) of the ICJ Statute corresponds to the sources of international law enumerated in section 102 of the Restatement (Third) of the Foreign Relations Law of the United States. Section 102 reads:

> (1) A rule of international law is one that has been accepted as such by the international community of states
>
> > (a) in the form of customary law;
> >
> > (b) by international agreement; or
> >
> > (c) by derivation from general principles common to the major legal systems of the world.
>
> (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.
>
> (3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when

> such agreements are intended for adherence by states generally and are in fact widely accepted.
>
> (4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.

1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102.

Section 701 of the Restatement indicates that the obligation to respect human rights may be reflected in a treaty, customary international law or "general principles of law common to the major legal systems of the world." It declares:

> A state is obligated to respect the human rights of persons subject to its jurisdiction
>
> (a) that it has undertaken to respect by international agreement;
>
> (b) that states generally are bound to respect as a matter of customary international law (§ 702); and
>
> (c) that it is required to respect under general principles of law common to the major legal systems of the world.

2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §

701.

Section 702 of the Restatement provides additional guidance on what constitutes customary international law. It declares:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones
>
> (a) *genocide*,
>
> (b) slavery or slave trade,
>
> (c) the murder or causing the disappearance of individuals,
>
> (d) *torture* or other cruel, inhuman, or degrading treatment or punishment,
>
> (e) prolonged arbitrary detention,
>
> (f) systematic racial discrimination, or
>
> (g) *a consistent pattern of gross violations of internationally recognized human rights.*

§ 702 (emphasis added). This list was not meant to be exhaustive. § 702 cmt. a.

The only subdivisions of section 702 that arguably could be relevant to plaintiffs' claims are (a), (d) and (g). None can be construed to apply to the use of herbicides in the Vietnam War. The United States was seeking to aid the Vietnamese, not wipe them out. And there was

no internationally recognized human right that would have required an armed force to refrain from using herbicides to protect its troops and those of its allies. No recognized source of international law that might have applied up to 1975 could have been interpreted as outlawing use of herbicides in the way they were utilized in Vietnam.

As to destruction of jungle cover behind which the enemy could move and ambush troops, there appears to have been no generally accepted rule prohibiting the practice. *But cf.* DAVID J. BEDERMAN ET AL., INTERNATIONAL LAW: A HANDBOOK FOR JUDGES 111-13 (Am. Soc'y of Int'l Law 2001) (discussing destruction of environment *during peace*). Almost since walled cities were developed the procedure of clearing surrounding areas for outgoing fire and to prevent sneak attacks was accepted military practice. No theoretical basis for distinguishing clearings for military advantage by attackers rather than defenders is apparent.

Nor, as to destruction of food sources, where this tactic has apparent military advantage, was there a generally accepted prohibitory rule of international law. Investiture of cities to starve the occupants (both military and civilian) into surrender was common. Collection of food and fodder from the country to feed troops and deny it to the enemy troops and civilians supporting those troops was accepted. As General Grant put the matter

> I regarded it as humane to both sides to protect the persons of those found at their homes, but to consume everything that could be used to supply

> armies. . . . Such supplies within the reach of Confederate armies I regarded as much contraband as arms or ordnance stores. Their destruction was accomplished without bloodshed and tended to the same result as the destruction of armies. . . .
>
> This policy I believe exercised a material influence in hastening the end.

PERSONAL MEMOIRS OF U.S. GRANT 192 (E. B. Long ed., 2001) (1952); *cf.* JOSEPH J. ELLIS, HIS EXCELLENCY GEORGE WASHINGTON 26 (2004)(referring to order of twenty-three year old George Washington in 1755 to his Virginia Regiment fighting the French and Indians, "when constructing stockades, clear the surrounding trees and brush beyond musket range (a lesson he had learned from Fort Necessity)").

In World War I the British by their naval blockade attempted to starve the Germans. *See, e.g.*, ARTHUR HERMAN, TO RULE THE WAVES: HOW THE BRITISH NAVY SHAPED THE MODERN WORLD 493, 513 (2004) (referring to "a long-distance blockade on Germany, in order to 'strangle the whole national life of the enemy.'"); BENJAMIN A. VALENTINO, FINAL SOLUTIONS: MASS KILLINGS AND GENOCIDE IN THE TWENTIETH CENTURY 85 (2004) ("During the First World War, . . . more than 250,000 people died of starvation and malnutrition when the British blockaded Germany and Austria-Hungary in an effort to starve them into surrender."). In World War II the Germans attempted to starve the British, and the United States to starve the Japanese, by

unrestrained submarine warfare. HERMAN, *supra*, at 535, 545. Particularly where so much of the enemy force is guerilla in nature and lives off the land, as in the Vietnam War, destruction of crops supporting mobile forces can not be said to have been contrary to tradition up to 1975, even if the international view of its appropriateness may have changed subsequently.

No executive or legislative action prior to 1975 showed an understanding of international law that would support plaintiffs' position. Despite the fact that Congress and the President were fully advised of a substantial belief that the herbicide spraying in Vietnam was a violation of international law, they acted on their view that it was not a violation at the time. A jointly held position of the other two independent branches of government should cause a court to reconsider carefully its disagreement. In late 1961 the State Department and the Department of Defense recommended initiation of a "large-scale herbicidal/chemical warfare program" against the efforts of the DRVN and the Vietcong to overthrow by military force the government of South Vietnam. In connection with that joint recommendation, Secretary of State Dean Rusk advised President Kennedy that "successful plant-killing Ops in [Vietnam], carefully coordinated with and incidental to larger Ops, can be of substantial assistance in the control and defeat of the [Vietcong]," and that *"the use of defoliant does not violate any rule of international law concerning the conduct of chemical warfare and is an accepted tactic of war."* Memorandum from Secretary of State Dean Rusk to President John F. Kennedy (Nov. 24, 1961), *supra* (emphasis added). President Kennedy accepted a "joint recommendation," and in November 1961

approved the start of military herbicide operations. Defoliation operations began in September 1962, and missions targeting crops that sustained enemy forces commenced in November of that year.

During the relevant time period Congress repeatedly suggested its approval of United States military use of herbicides by its failure to act despite full knowledge of this use. While not decisive, its inaction belies the inference of any legislative belief that the manufacture or sale of those herbicides could or should give rise to liability under international norms applicable to the United States. Congress approved numerous appropriations for combat operations in Vietnam while aware that the military expended some of those funds for the herbicide program. In 1970, the Senate rejected amendments attempting to prohibit the use of government funds for precisely these purposes. In ratifying the 1925 Geneva Protocol in 1975, the Senate emphasized its understanding that the United States' prior use of herbicides in Vietnam had not violated that treaty and that the United States only intended the Protocol to be prospective in effect. *See Prohibition of Chemical and Biological Weapons: Hearing on S. Res. Before the S. Comm. on Foreign Relations*, 93d Cong. 3 (1974) (statement of Sen. Humphrey) (reassuring the Executive Branch that Congress's adoption of the 1925 Geneva Protocol "would in no way reflect on our past practice with regard to chemical agents. The manner in which herbicides and riot control agents were used in Vietnam was fully in accordance with the United States prevailing interpretation of the protocol.").

Herbicides were tactically used in Vietnam because they were believed to be effective in meeting important

United States and allied military objectives. As a spokesman for the Department of Defense told Congress, "the use of . . . herbicides [in Vietnam] was appropriate and had one purpose--to save the lives of Americans and our allies." *U.S. Chemical Warfare Policy, Hearing Before the Subcomm. on Nat'l Sec. Policy and Sci. Devs. of the House Comm. on Foreign Affairs*, 93d Cong. 154 (1974) (statement of Amos Jordan, Acting Assistant Secretary for International Security Affairs, Department of Defense). Other Executive Branch officials informed Congress that the herbicide program was "effective in enhancing the success of allied combat operations," and that their use was "helpful in protecting the American soldier and contributing to successful accomplishment of the ground combat mission." *Chemical-Biological Warfare: U.S. Policies and International Effects, Hearing Before the Subcomm. on Nat'l Sec. Policy and Sci. Devs. of the House Comm. Foreign Affairs*, 91st Cong. 223-25, 231-32 (1969) (statement of Rear Admiral William E. Lemos, Director of Policy Plans and National Security Council Affairs). The military instituted policies, even if they were not fully complied with, intended to ensure that the herbicides were applied only to targets of military significance. *See, e.g., id.* at 230 (noting that in order to continue to protect civilians from herbicide exposure, the Defense Department "has issued instructions to the Joint Chiefs of Staff to reemphasize the already existing policy that 2,4,5-T be utilized only in areas remote from population").

2. Crimes Against Humanity

In the book *Crimes of War*, Cherif Bassiouni has sought

to clarify the meaning of "crimes against humanity." He wrote:

> The term crimes against humanity has come to mean anything atrocious committed on a large scale. This is not, however, the original meaning nor the technical one. *The term originated in the 1907 Hague Convention preamble, which codified the customary law of armed conflict.* This codification was based on existing State practices that derived from those values and principles deemed to constitute the "laws of humanity," as reflected throughout history in different cultures.
>
> After World War I, the Allies, in connection with the Treaty of Versailles, established in 1919 a commission to investigate war crimes that relied on the 1907 Hague Convention as the applicable law. In addition to war crimes committed by the Germans, the commission also found that Turkish officials committed "crimes against the laws of humanity" for killing Armenian nationals and residents during the period of the war. The United States and Japan strongly opposed the criminalization of such conduct on the grounds that crimes against the laws of humanity were violations of moral and not positive law.
>
> *In 1945, the United States and other Allies developed the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal (IMT),* sitting at Nuremberg,

which contained the following definition of crimes against humanity in Article 6(c):

> Crimes against humanity: murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The Nuremberg Charter represents the first time that crimes against humanity were established in positive international law. The International Military Tribunal for the Far East, at Tokyo, followed the Nuremberg Charter, as did Control Council Law No. 10 of Germany, under which the Allies prosecuted Germans in their respective zones of occupation. *Curiously, however, there has been no specialized international convention since then on crimes against humanity.* Still, that category of crimes has been included in the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as in the statute of the International Criminal Court (ICC). *In fact, there are eleven international texts defining crimes against humanity, but they all differ slightly as to their definition of that crime and its legal elements. However, what all of these definitions have in common is: (1) they refer to specific acts of violence against persons* irrespective of whether the person is a national

or nonnational and irrespective of whether these acts are committed in time of war or time of peace, *and (2) these acts must be the product of persecution against an identifiable group of persons* irrespective of the make-up of that group or the purpose of the persecution. Such a policy can also be manifested by the "widespread or systematic" conduct of the perpetrators, which results in the commission of the specific crimes contained in the definition.

The list of the specific crimes contained within the meaning of crimes against humanity has been expanded since Article 6(c) of the IMT to include, in the ICTY and the ICTR, rape and torture. The statute of the ICC also expands the list of specific acts. In particular, the ICC statute adds the crimes of enforced disappearance of persons and apartheid. Further, the ICC statute contains clarifying language with respect to the specific crimes of extermination, enslavement, deportation or forcible transfer of population, torture, and forced pregnancy.

To some extent, crimes against humanity overlap with genocide and war crimes. But *crimes against humanity are distinguishable from genocide in that they do not require an intent to "destroy in whole or in part,"* as cited in the 1948 Genocide Convention, *but only target a given group and carry out a policy of "widespread or systematic" violations.* Crimes against humanity are also distinguishable from war crimes in that they not only apply in the context of war--they apply in times of war and peace.

Crimes against humanity have existed in customary international law for over half a century and *are also*

evidenced in prosecutions before some national courts. The most notable of these trials include those of Paul Touvier, Klaus Barbie, and Maurice Papon in France, and Imre Finta in Canada. But crimes against humanity are also deemed to be part of jus cogens--the highest standing in international legal norms. Thus, they constitute a non-derogable rule of international law.

Cherif Bassiouni, *Crimes Against Humanity, in* CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 107, 107-08 (Roy Gutman & David Rieff, eds., 1999), http://www.crimesofwar.org/thebook/crimes-against-humanity. html (emphasis added).

Even given the broad definition of crimes against humanity provided by Bassiouni and others, the use of herbicides in Vietnam prior to 1975 would not have been characterized as coming within the definition. Except as discussed under specific treaties, statutes or specific rules, the general concept had no application to pre-1975 use of herbicides in Vietnam.

3. Proportionality

The concept of military necessity or proportionality is a well accepted international norm governing the conduct of war. The United States Army's manual, The Law of Land Warfare, states the rule succinctly: "Loss of life and damage to property must not be out of proportion to the military advantage to be gained." U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE P41 (1956); *cf.* Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the 1980 Conventional Weapons Convention, Oct. 10, 1980, art.

2(4), 1342 U.N.T.S. 171, 172 (providing that forest cover may be the object of incendiary attack when "such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives"); Protocol I, *supra*, art. 52(2), 1125 U.N.T.S. at 27 (permitting dual-use crop destruction if it does not lead to starvation of individuals prohibited by Article 54).

Applying the principle presents difficulties, as the final report on the NATO bombing in the Kosovo war to the Prosecutor for the International Criminal Tribunal for the former Yugoslavia ("ICTY") noted:

> The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. . . . It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia P48 (June 13, 2000), available at www.un.org/icty/pressreal/nato061300.htm [hereinafter ICTY Final Report]; *see also* Anderson Decl. ¶¶67-68

(stating that the calculation of whether military action was necessary or proportional is an "open-ended, imprecise and subjective" task and that, because of its "inherent subjectivity and imprecision, people with different backgrounds and in different circumstances can easily reach different but equally legitimate conclusions on exactly the same facts"); FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 46 (3d ed. 2001) (noting the "lack of precision inherent in [the proportionality rule]"), http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0793/ile/ICRC_002_0793.PDF!Open.

Defendants claim that a norm that is so "open-ended, imprecise and subjective," Anderson Decl. ¶67, that international bodies charged with its enforcement often cannot say "what it means and how it is to be applied," ICTY Final Report 48, is not defined with the specificity required by *Sosa*. It is contended that the norm of proportionality is so subjective that, like judgments in the field concerning military necessity, they are often "not considered suitable for second-guessing by courts, international, military or otherwise." Anderson Decl. ¶73. This may explain, according to defendants, why no prosecutions based on violations of that norm seem to have occurred since World War II. Anderson Decl. ¶75 ("I have followed this body of law for many years, discussing it repeatedly with military lawyers, human rights lawyers, and scholars, and I am not aware of any court martial or other legal case since the Second World War that directly turns on disproportionate devastation *by a*

commander--meaning a case where the legal issue is disproportionality as a war crime as such." (emphasis added)).

The ICTY Final Report's recommendation against prosecution lends some slight support for the proposition proffered by defendants that a factor militating against recognition of a private cause of action in the instant case is proportionality. The Court explained in *Sosa* that courts should be especially cautious about creating a private right of action due to considerations such as whether to "permit enforcement [of a norm] without the check imposed by prosecutorial discretion." 124 S. Ct. at 2763. The ICTY Report reflects the assumption that, when criminal prosecutorial discretion is exercised, "proportionality" violations usually will not be prosecuted since the prosecutor acts as a gatekeeper to protect the accused against unfair or ambiguous charges. The ICTY Report's recommendation against prosecution of an alleged violation based, in part, on the imprecision and subjectivity of the proportionality concept, *see* Anderson Decl. ¶78, does point to a possible danger in permitting such claims to proceed on a wholesale basis in civil courts without any prosecutorial discretionary check.

American courts are fully capable of applying the proportionality concept in civil litigations as demonstrated by their handling of comparative negligence, proximate cause and other sophisticated doctrines. Nevertheless, the criminal procedural aspects of proportionality, the inherently subjective judgments necessary to determine whether the concept applies, and the dearth of illustrative prosecutions, all

demonstrate that federal courts should pause before recognizing a civil private cause of action under the ATS on the theory that the United States may have properly used herbicides in some situations for legitimate military purposes, but that it used too much of them in too many places. *See, e.g.*, Robert A. Shade, Management of the Department of Defense Vietnam Herbicide Program 44 (1969) ("The personnel in Vietnam [commented] that any alternative changing the application rate from three gallons of undiluted Orange per acre was unacceptable. Their reasons were that experience in Vietnam, as well as the test program conducted in Thailand by personnel from Fort Detrick, showed that maximum leaf fall and duration of defoliation was obtained at this application rate. Shorter duration of defoliation would necessitate respraying more often. Because of the need to respray more often, these alternatives would not, in the long run, result in any significant overall decrease in herbicide requirements. In fact, sortie requirements would increase, subjecting the air crews to a greater hazard from enemy ground fire and increasing the cost.") (Ex. 10 to Aff. of Michael M. Gordon in Opp'n to Pls.' Second Am. Mot. for Recons. of Ct.'s Decision Granting Summ. J. to Defs. on Basis of the Government Contractor Defense Feb. 8, 2005). It cannot be shown that the military in the field--or the executive and legislative branches at home--violated proportionality norms when using herbicides in the Vietnam War.

As plaintiffs argue, a consensus among nations may gradually solidify into recognized international law provided that such consensus is reflected in state practice accompanied by *opinio juris*. No such understanding or consensus existed with respect to

herbicides prior to 1975--possibly in part because of the proportionality problem.

XII. 1975 Presidential and Congressional Action

A. President

Following considerable Congressional debate beginning at least as early as 1970, in 1975 President Ford, by Executive Order 11850, adopted the United States policy of renouncing first use of herbicides in warfare. This action was taken almost simultaneously with the Senate's ratification of the 1925 Geneva Protocol. *See infra* Part XII.B.; *see also supra* Part XI.C.2. (discussing 1925 Geneva Protocol). The order read as follows:

Executive Order 11850

Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents

April 8, 1975

> *The United States renounces, as a matter of national policy, first use of herbicides in war except use, under regulations applicable to their domestic use,* for control of vegetation within U.S. bases and installations or around their immediate defense perimeters, and first use of riot control agents in war except in defensive military modes to save lives such as:
>
> (a) Use of riot control agents in riot control situations in areas under direct and distinct U.S.

military control, to include controlling rioting prisoners of war.

(b) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.

(c) Use of riot control agents in secure missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners.

(d) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations.

I have determined that the provisions and procedures prescribed by this Order are necessary to ensure proper implementation and observance of such national policy.

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States of America by the Constitution and laws of the United States and as Commander-in-Chief of the Armed Forces of the United States, it is hereby ordered as follows:

SECTION 1. The Secretary of Defense shall take all necessary measures to ensure that the *use by the Armed Forces of* the United States of any riot control agents and *chemical herbicides in war is prohibited unless such use has Presidential approval, in advance.*

> SECTION 2. The Secretary of Defense shall prescribe the rules and regulations he deems necessary to ensure that the national policy herein announced shall be observed by the Armed Forces of the United States.
>
> GERALD R. FORD

Exec. Order No. 11,850, 40 Fed. Reg. 16,187 (April 8, 1975) (emphasis added).

Congressional hearings leading up to this order gave no indication that herbicide use was outlawed by general consensus as a weapon of war before 1975. Whatever the post-1975 effect of President Ford's executive order, it had no retroactive effect. *See* EUGENE DAVIDSON, THE NUREMBERG FALLACY 285 (University of Missouri Press 1998) ("The United States has also stopped using defoliants but it has not renounced their possible future employment . . . ."). Use of herbicides by the United States in Vietnam had ceased years before President Ford's 1975 order was issued.

No treaty or agreement, express or implied, of the United States operated to make use of herbicides in Vietnam a violation of the laws of war or any other form of international law until at the earliest April of 1975. *See also supra* Part XI.C.2. on ratification by United States of the Geneva Convention.

Whether even President Ford's order, without the consent of the Senate, could have had the effect of confirming a rule of international law binding on the United States is a matter that need not now be decided.

As Commander-in-Chief of the armed forces he had the power to order that herbicide use be limited in war, but that order alone would not bind future presidents. *Cf.* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) ("The President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution."). Subsequent events leave the matter somewhat up in the air. The 1993 Chemical Weapons Convention did not outlaw the use of herbicides even though it prohibited use of tear gas. The 1972 Additional Protocol I to the Geneva Conventions covered protection of natural resources, but the United States has not ratified it. *See* Message of President Ronald Reagan to United States Senate, Jan. 29, 1987, *reprinted in* 26 I.L.M. 561 (1987).

B. Congress

Congress ratified the 1925 Geneva Protocol on December 16, 1974, making us a party to that treaty. But that ratification itself did not constitute an acknowledgment that the 1925 Geneva Protocol outlawed the use of herbicides as a weapon. See *supra* Part XI.C.2. for terms of the ratification.

The issue of the legality of herbicide use during war was thoroughly debated by congressional committees before, and contemporaneously with, President Ford's declaration. *See, e.g.*, Report of the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, House of Representatives, *Chemical-Biological Warfare: U.S. Policies and International Effects*, with an *Appended*

Study on the Use of Tear Gas in War: A Survey of International Negotiations and U.S. Policy and Practice pursuant to H. Res. 143 (1970) [hereinafter House Report]; Hearings before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, House of Representatives, 91st Cong., 1st Sess., *Chemical-Biological Warfare: U.S. Policies and International Effects* (1970) [hereinafter House Subcomm. Hearings]; Hearings before the Committee on Foreign Relations, United States Senate, 92nd Cong., 1st Sess., *The Geneva Protocol of 1925: The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare* (1972) [hereinafter Senate Hearings].

As Chairman Fulbright of the Senate Committee on Foreign Relations put the matter in his foreword to the Senate Hearings, he thought the United States should not use herbicides because they were not effective and their use was opposed by most nations. He wrote in October 1972 (after use of herbicides in Vietnam by the United States had ceased):

> A year and a half ago, in March, 1971, the Committee on Foreign Relations held extensive hearings on the Geneva Protocol of 1925, which the President had resubmitted for the Senate's advice and consent. Following those hearings the Committee expressed to the President its strong support for the objectives of the Protocol but asked the President to reconsider the Administration's interpretation that the Geneva

Protocol does not prohibit the use of tear gas and herbicides in warfare.

These views were set forth in a letter which I sent to the President on behalf of the Committee on April 15, 1971. . . . In the same letter, the Committee expressed its desire to have available to it before acting on the Protocol several studies then in progress within the Executive Branch relating to the use of herbicides and tear gas in Vietnam and their possible utility in other situations. Our letter also indicated that the Committee would await the President's response before taking further action on the Protocol.

. . . .

Since March, 1971, there have been several developments related to the issues raised in the hearings. Despite assurances given by the Secretary of State to the Committee that American military use of herbicides in Vietnam would be phased out, *the use of herbicides by American forces has been reduced but not eliminated [But see* Figure 1, *supra* Part II]. Similarly, the use of tear gas, particularly of the potent CS2 form, also continues, both by American and by South Vietnamese forces, the latter being trained and supplied by the Americans. There have also been reports of the use of tear gas by the North Vietnamese, this being the almost inevitable and, indeed, the predicted consequence of our own use of such gas.

During this interim period there have also been positive developments relating to the control of chemical and biological weapons. The United States and many other nations have concluded a Convention for the Prohibition of Development, Production and Stockpiling of Bacteriological and Toxin Weapons. This treaty was signed in Washington on April 10, 1972, and was submitted to the Senate for its advice and consent on August 10, 1972. In addition, discussion has now begun in the U.N. Conference of the Committee on Disarmament at Geneva regarding a chemical weapons convention.

It is unfortunate that while these efforts have been going forward that the Administration has not demonstrated any interest in removing the cloud which it has placed over the Geneva Protocol by virtue of its interpretation regarding tear gas and herbicides. This inflexibility coupled with the fact of our continued use of these agents in Vietnam threatens to undermine the ultimate effectiveness of the new conventions.

The preamble of the Bacteriological Convention reaffirms the significance of the Geneva Protocol as the foundation for subsequent international agreements in this area. Most nations of the world take the view that our use of tear gas and herbicides in Vietnam is contrary to the provisions of the Geneva Protocol. Indeed, the preamble of the Convention specifically notes that the General Assembly "has repeatedly condemned all actions contrary to the principles and objectives" of the Protocol. It is difficult in

light of these circumstances to see how the United States adherence to the Convention can be reconciled with the Administration's rejection of the universally accepted interpretation of the Protocol.

In my view it is regrettable that the Executive Branch has ignored the Committee's efforts to resolve the difficulties posed by its interpretation of the Protocol. It is now more important than ever that the Executive Branch come to grips with the question of U.S. adherence to the Protocol in order that this issue not complicate consideration of the Bacteriological Convention.

The Executive Branch studies relating to tear gas and herbicides which the Secretary of State told the Committee were in progress at the time of the 1971 hearings are reported to have been completed. Yet to date none of these studies has been made available to or discussed with the Committee.

Similarly the Executive Branch has ignored the Committee's requests for its comments on two proposals relating to the interpretation of the Geneva Protocol, S. Res. 154 and S. Res. 158, introduced by Senators Humphrey and Brooke in July 1971. . . . While the Committee has not taken a position on these resolutions and could hardly be expected to do so in the face of continued Executive Branch silence, these resolutions do represent constructive efforts to resolve the question of the Protocol's interpretation.

> We are hopeful that the appearance of these hearings coupled with the President's submission of the Bacteriological Convention to the Senate will stimulate new interest on the part of the public and the Executive Branch in full U.S. adherence to the Geneva Protocol. It would appear that *the only impediment to such progress is the reluctance of the Administration to forego the option to employ tear gas and herbicides in future wars. It is difficult to reconcile this position with our knowledge that their military utility is open to serious questions, that their actual use in Vietnam is undermining the restraints inherent in the Geneva Protocol,* and that the opprobium which attaches to their use is nearly universal.
>
> A decision on the part of the Administration to [seek] ratification of the Geneva Protocol without any special exceptions for the use of herbicides and tear gas in warfare would, in my view, be a constructive act. A renunciation of the option to use these weapons would not adversely affect our national security and, indeed, it would represent the single greatest contribution which our nation could make now to the creation of truly effective and universal barriers against one of the most repugnant of all forms of warfare.

Senate Hearings, *supra*, at iii-iv (emphasis added).

While some senators, including Senator Fulbright, were of the view that use of herbicides were or should be outlawed, Congress was not prepared to take a

position contrary to that of the Administration--that their use in Vietnam had not been outlawed by the 1925 Geneva Convention or by any other development. *See, e.g., id.* at iii (stating Administration's position that herbicides are not covered by the Geneva Convention); *id.* at 241-44 (arguing against use of herbicides); *id.* at 315-17 (discussing U.S. military's interpretation of the 1907 Hague Convention as being inapplicable to herbicides); *id.* at 430-31 (stating Administration's policies); House Subcomm. Hearings, *supra*, at 31 (discussing Administration's rejection of Representative Richard D. McCarthy's position against use of herbicides); *id.* at 52 (discussing use to kill rice crops); *id.* at 75 (discussing effect on unborn children); *id.* at 96 (discussing analysis of costs and benefits of use of herbicides); *id.* at 107 (discussing opposition to use of herbicides); *id.* at 109 (discussing damage to soil); *id.* at 111 (discussing harm to people); *id.* at 113 (discussing effect on birth defects).

The House Report suggested how difficult the legislature found the herbicide issue. It declared:

> The most controversial issue to emerge from our consideration of America's chemical-biological warfare policies and their international effects concerns the use of chemical agents by the United States and its allies in the Vietnam conflict. More specifically, those agents are tear gases such as the widely used CS which causes tears, coughing, and burning and stinging of the skin, and herbicides which are used to defoliate the jungle and destroy food sources of the enemy. Since each of these classes of chemical agents presents its own particular problems,

separate consideration is generally accorded them.

. . . .

Herbicides.--The principal objective of herbicide use in Vietnam has been to produce a significant improvement in vertical and horizontal visibility in jungle areas. Areas defoliated have included our own base perimeters; roads, trails, and waterways; infiltration routes; and enemy base camps. A secondary use of herbicides is to destroy crops in order to deny food supplies to Vietcong forces. According to the Department of Defense, herbicide operations have been helpful in protecting American soldiers and have contributed to successful accomplishment of ground combat missions.

Questions have been raised both internationally and domestically about the widespread use of herbicides because of fears about their effects on Vietnam's natural settings and on its people. No country has ever been subjected to such intensive use of herbicides as has South Vietnam since 1962. According to Department of Defense figures, as of the end of July, 1969, the United States has sprayed with herbicides 5,070,800 acres, a figure equivalent to more than 10 percent of the total land area of South Vietnam.

When defoliating operations were begun, herbicidal chemicals were not believed to be permanently damaging to plants or toxic to human beings. With the passage of time,

however, evidence has grown that concentrated applications may have drastic effects on the environment and on people intensively exposed. Laboratory tests have indicated, for example, that one frequently used herbicide, 2,4,5-T, causes birth malformations in mice and rats. As a result its use in Vietnam recently was halted, at least temporarily. Other chemicals still commonly used in Vietnam also have been questioned by members of the scientific community for their environmental effects and safety for human beings. Among those herbicidal agents are 2,4,D, picloram, and cacodylic acid.

Collateral issues related to the use of herbicides concern the possibility of U.S. liability for expensive damage claims in the future, and the belief of some observers that the destruction of food supplies primarily hurts women, children, and other noncombatants rather than hostile forces.

Internationally, the use of nonlethal gases and herbicides in Vietnam has resulted in considerable criticism of the United States. Our Nation has been charged with violating international law including the Geneva Protocol, and with breaking down the barriers to chemical and biological warfare which have existed since World War I. In December 1969, the United Nations General Assembly approved a resolution, by 80 votes to 3, with 36 abstentions, declaring that the Geneva Protocol prohibits all chemical agents which have direct toxic effect on

> men, animals, and plants. The resolution was aimed primarily at U.S. practice in Vietnam.
>
> One of the three nations which voted against the resolution was the United States. . . . With respect to herbicides, the U.S. position is that neither the language of the protocol nor the negotiating history indicates an intention to cover antivegetation chemical agents. Moreover, the United States, although not a party to the protocol, has rejected the rights of the General Assembly to interpret or declare principles of international law embodied in the protocol or other treaties "where the rules are ambiguous and where universal consensus is lacking."

House Report, *supra*, at 4-6 (footnote omitted).

The House Report concluded in part

> The continued, large-scale use of chemical agents in Vietnam by the United States creates troublesome political problems. Those problems are virtually certain to be central to Senate consideration of the protocol, if it is submitted as expected with an interpretation that the treaty's prohibitions do not cover the use in war of tear gas or chemical herbicides. To the extent that approval of such an interpretation would constitute endorsement of current CW activities, it could provoke opposition. Opponents would include (1) those who believe that CS employment in Vietnam goes significantly beyond the restricted usage justified by U.S.

officials at the time the decision was made; (2) those who feel that current evidence about toxicity of some herbicides to man and nature require more thorough investigation; (3) those who believe the Geneva Protocol prohibits the use of tear gas and herbicides in warfare; and (4) those who are sensitive to international concerns that American activities have eroded barriers against CBW erected after World War I. On that last point, it is possible that other signatory nations would not accept the United States as a party to the protocol if they find that the U.S. interpretation strikes into the heart of the treaty and masks what they would consider to be essentially a reservation. This dilemma may seriously complicate Senate consideration of the protocol and is a legitimate cause for concern.

The difficulty might be resolved if the United States were to take a position, or make an interpretation, that the use of tear gas and herbicides in warfare is an open question, given the apparent ambiguity of the protocol on the subject. Our stance could be that the problem of tear gas and herbicides is not a moral issue, but rather an important technical and legal question which relates to the prevention of proliferation and escalation of chemical-biological capabilities. *Since the question is an open one, current chemical warfare activities in Vietnam cannot be considered illegitimate or in violation of the protocol.* We then could go on to declare our willingness as a nation to abide by whatever uniform and workable rule which we and other signatories to the protocol eventually could

decide upon. Such an approach, it appears, would speed approval of the protocol itself and reduce significantly the possibilities of international repercussions over the U.S. interpretation of the treaty. Moreover, as U.S. combat activities wane in Vietnam, it might be possible to scale down substantially CW operations as testimony to our good faith.

. . . .

RECOMMENDATIONS

. . . .

(3) The question of the use of tear gas and herbicides in warfare should be left open in any formal or informal interpretation of the protocol made by the executive branch or the Senate, and once the United States becomes a party to the treaty it should seek agreement with the other parties on the uniform interpretation of the scope of the protocol, either through a special international conference among the parties or through established international juridicial procedures.

Id. at 9-10 (emphasis added).

The general legislative position that international law did not forbid use of herbicides in Vietnam, although it probably should in the future, represented the United States view until 1975. Based upon executive decisions and the hearings in both the Senate and House, the official position of this country up to 1975 could be

summarized as follows: On the one hand, many scientists, political figures and others opposed the use by the United States of herbicides in Vietnam because of possible health dangers to those exposed directly or indirectly, because of the possible damage to the land and the continued hazards of toxic contamination to future generations, because of possible teratological effects on children of those who had been exposed, because of substantial opposition from the international community of nations, and because of doubts about efficacy. On the other hand, the armed forces, the State Department, the President, and a substantial number of legislators opposed characterizing the use of herbicides, as they were utilized in Vietnam, as a violation of international law, and particularly as a violation of the 1925 Geneva Convention. The result was deadlock and the *status quo ante*. Related issues were widely debated in the literature. *See, e.g.*, Paul G. Cassell, Note, *Establishing Violations of International Law: "Yellow Rain" and the Treaties Regulating Chemical and Biological Warfare*, 35 STAN. L. REV. 259, 261 (1983) ("[A] fear of highly technological invisible weapons able to kill in mysterious ways with unpredictable consequences." Yellow Rain was believed to have been used by the Russians, but was found to be a harmless natural phenomenon); *cf.* Jonathan P. Edwards, *The Iraqi Oil "Weapon" in the 1991 Gulf War: A Law of Armed Conflict Analysis*, 40 NAVAL L. REV. 105, 130 (1992) (concluding that Iraq's setting fire to oil wells and releasing crude oil into the Persian Gulf were violations of international law of armed combat).

The Kennedy, Johnson and Nixon administrations, which actively prosecuted the war in Vietnam, were unwilling to declare utilization of herbicides illegal even

though the United States effectively ended use by our military by 1971. It was not until the Ford administration that this country was ready to officially come to grips with the international law issue. Until the matter was resolved in 1975 by President Ford and the Senate it is fair to conclude that proscription of the use of herbicides in Vietnam was not recognized by the United States (and by implication its allies in Vietnam including Australia, New Zealand, South Korea, Turkey, and others) as a violation of international law. *Cf. 1* JAMES BROWN SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907, at 37 (1909) ("The support of the larger nations is necessary in order to give international force and effect to a proposition . . . ."). That was also the position of the British who had used helicopters to spray herbicides in their Malaya military operations. *See* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 16 (enlarged ed. 1987); Memorandum from Secretary of State Dean Rusk to President John F. Kennedy (Nov. 24, 1961), *supra.*

Since the herbicide use by the United States complained of by plaintiffs ended years before 1975, the April 1975 declaration of President Ford and the action of the Senate in ratifying the 1925 Geneva Protocol and the Biological Weapons Convention in April 1975 did not retroactively make illegal United States' use of herbicides in Vietnam. The defendants in the instant case had no connection with, or foreknowledge of, South Vietnam forces' alleged use of herbicides in the 1970s so they are not responsible for what those forces may have done independently after the United States abandoned the program in 1971. Nor do defendants have a retroactive obligation to detoxify the land or to

gather up discarded empty dioxin contaminated barrels or other implements long since abandoned by the United States. Defendants are not culpable civilly under international law. The reasons and techniques for modern mass killings are not in any way comparable to the reasons and techniques in the use of herbicides in Vietnam. *See, e.g.*, DAVID CHUTER, WAR CRIMES: CONFRONTING ATROCITY IN THE MODERN WORLD 3 (2003) (discussing war crimes as including murder, torture, rape and theft on a huge scale); BENJAMIN A. VALENTINO, FINAL SOLUTIONS: MASS KILLING AND GENOCIDE IN THE TWENTIETH CENTURY 81 (2004) (discussing use of mass killings "to coerce large numbers of civilians or their leaders into submission").

XIII. Conclusion

There is no basis for any of the claims of plaintiffs under the domestic law of any nation or state or under any form of international law. The case is dismissed. No costs or disbursements to any party.

SO ORDERED.

Jack B. Weinstein

Brooklyn, New York

5/7/08

Docket No. 05-1953-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, et al, Plaintiffs-Appellants,

-v.-

DOW CHEMICAL COMPANY, et al, Defendants-Appellees

ORDER

Appellant Vietnam Association for Victims of Agent orange, et al, and Amicus Curiae Veterans for Peace and the Vietnam Agent Orange Relief and Responsibility Campaign having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

117 (2)

No. 08-470

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, *et al.*,

Petitioners,

v.

DOW CHEMICAL COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied the "demanding standard" of *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), to conclude that respondents' conduct in supplying the U.S. military with Agent Orange and other herbicides for use in destroying vegetation during the Vietnam conflict—which use allegedly had unintended but foreseeable toxic effects on humans—violated no norm of international law that was sufficiently accepted and definite so as to support the recognition of a federal common law cause of action.

2. Whether the court of appeals correctly affirmed the dismissal of petitioners' state-law tort claims based on the government contractor defense.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6 of the Rules of the Supreme Court, respondents hereby state:

1. **Monsanto Company.** Monsanto Company has no publicly owned parent corporation, and no publicly held corporation owns more than 10 percent of Monsanto's stock.

2. **Monsanto Chemical Company.** Monsanto Chemical Company, which no longer exists, is a corporate predecessor of Pharmacia Corp., which is a wholly-owned subsidiary of Pfizer Inc., a publicly held corporation.

3. **The Dow Chemical Company.** The Dow Chemical Company has no parent corporations and no publicly held company owns 10 percent or more of its stock.

4. **Occidental Chemical Corporation.** Occidental Chemical Corporation, the successor by merger to Diamond Shamrock Chemicals Company (which was known prior to September 1, 1983, as Diamond Shamrock Corporation), is an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, a publicly held company.

5. **Valero Energy Corporation.** Valero Energy Corporation, the successor by merger to Ultramar Diamond Shamrock Corporation, has no parent corporation, and there is no publicly held company owning 10 percent or more of the corporation's stock.

6. **Maxus Energy Corporation.** Maxus Energy Corporation is an indirect, wholly-owned subsidiary of YPF S.A. ("YPF"). Approximately 85 percent of YPF's stock is owned by Repsol YPF S.A. ("Repsol

YPF"); approximately 15 percent of YPF's stock is held by The Peterson Group, a private corporation. Repsol YPF is publicly held.

7. Tierra Solutions, Inc. Tierra Solutions, Inc., formerly known as Chemical Land Holdings, Inc., is an indirect, wholly-owned subsidiary of YPF S.A. ("YPF"). Approximately 85 percent of YPF's stock is owned by Repsol YPF S.A. ("Repsol YPF"); approximately 15 percent of YPF's stock is held by The Peterson Group, a private corporation. Repsol YPF is publicly held.

8. Hercules Incorporated. Hercules Incorporated is a wholly owned subsidiary of Ashland, Inc.

9. Uniroyal, Inc. Uniroyal, Inc. is a dissolved corporation.

10. Uniroyal Chemical Co.; Uniroyal Chemical Holding Company and Uniroyal Chemical Acquisition Corporation. Uniroyal Chemical Holding Company and Uniroyal Chemical Acquisition Corporation were predecessors and/or wholly-owned subsidiaries of Uniroyal Chemical Co. Uniroyal Chemical Co. is a wholly-owned subsidiary of Chemtura Corp., a publicly held company.

11. C.D.U. Holdings, Inc. C.D.U. Holdings, Inc. is a dissolved corporation.

12. Hooker Chemical Corporation; Hooker Chemical Far East Corporation; and Hooker Chemicals & Plastics Corp. Hooker Chemical Corporation; Hooker Chemical Far East Corporation; and Hooker Chemicals & Plastics Corp. are or were predecessors and/or wholly-owned subsidiaries of Occidental Chemical Corporation, an indirect, wholly-owned subsidiary

of Occidental Petroleum Corporation, a publicly held company.

13. TH Agriculture & Nutrition Company, Inc.; Thompson-Hayward Chemical Co.; and Harcros Chemical, Inc. TH Agriculture & Nutrition Company, Inc. (now known as TH Agriculture & Nutrition L.L.C.) is a wholly-owned subsidiary of Philips Electronics North America Corporation, formerly known as North American Philips Corporation. Philips Electronics North America Corporation is an indirect wholly-owned subsidiary of Koninklijke Philips Electronic N.V., a publicly held corporation based in the Netherlands. Thompson-Hayward Chemical Co. was a former subsidiary of North American Philips Corp. which no longer exists. These assets of Thompson Hayward Chemical Co. were purchased by Harcros Chemical Inc., which is a completely separate entity from Philips Electronics North America Corporation.

14. Riverdale Chemical Company. Riverdale Chemical Company is now known as Nufarm Americas, Inc., which is a privately held company. Nufarm Americas, Inc. is owned by Nufarm Americas Holding Co., and no publicly held corporation owns 10 percent or more of Nufarm Americas Holding Co.'s stock.

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IN THE

Supreme Court of the United States

No. 08-470

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, *et al.*,

Petitioners,

v.

DOW CHEMICAL COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Petitioners are a putative class of Vietnamese nationals—including civilians and former combatants on both sides of the Vietnam conflict—who allege that they were injured by exposure to herbicides used by the U.S. military to destroy vegetation providing enemy cover. Unable to sue the United States directly because of sovereign immunity, petitioners have invoked the Alien Tort Statute (ATS), 28 U.S.C. § 1350, against companies that manufactured the herbicides to the government's specifications. Petitioners' central assertion is that, by supplying the herbicides, respondents aided and abetted the U.S. military's alleged

commission of war crimes during the Vietnam conflict—specifically, violations of the international-law ban on "poison and poisoned weapons," the prohibition on employing war material "calculated to cause unnecessary suffering," and the norm of proportionality. Petitioners also assert tort claims under New York law.

1. *Herbicide operations in Vietnam.* A significant challenge for U.S. and allied military operations in Vietnam was "the inability to observe the enemy in the dense forest and jungle" from which deadly ambushes were launched. C.A. App. 1374 (Assistant Secretary of Defense William Lemos). Early in the conflict, the U.S. government began exploring the use of herbicides to reduce enemy cover, as well as to destroy enemy crops. Pet. App. 3a. Government research conducted in the 1940s and 1950s had already identified and field-tested two herbicidal chemicals, the n-butyl esters of 2,4-D and 2,4,5-T. *Id.* at 9a. In 1961, the Department of Defense recommended their use for defoliation purposes in Vietnam. *Id.*

Secretary of State Dean Rusk likewise advised President Kennedy that "successful plant-killing ops ... can be of substantial assistance in the control and defeat of the [Vietcong]." C.A. App. 1339. In late 1961, President Kennedy accepted those recommendations and approved military herbicide operations in Vietnam. Pet. App. 3a.

2. *Selection and procurement of the herbicides.* In January 1962, the Air Force began the operational phase of the program in South Vietnam, using an herbicide code-named Agent Purple. Pet. App. 188a-189a. Government researchers later concluded that a 50/50 mixture of 2,4-D and 2,4,5-T was most effective; that formulation became known as Agent Orange. *Id.* at 9a.

Other herbicides used in Vietnam, Agents Green and Pink, also contained 2,4,5-T. *Id.* at 185a.

The government promulgated formal specifications regarding the design and characteristics of each desired mixture of 2,4-D and 2,4,5-T. These specifications were later incorporated into government contracts used in the procurement of Agent Orange. Pet. App. 9a. Respondents' products met those specifications in all material respects. *Id.* at 68a. The government contracts specified that the only marking on the drums of the herbicides be a "three-inch color-coded band" that corresponded to the name of each "Agent." *Id.* at 10a. Petitioners have alleged that the herbicides were contaminated with small quantities of a toxic substance known as dioxin, a byproduct generated during the manufacture of 2,4,5-T. C.A. App. 55.[1]

In 1966, concerned that the pace of production of Agent Orange was insufficient to meet its projected needs, the government decided to compel production from the manufacturers. Pet. App. 10a. Invoking the Defense Production Act of 1950, 50 U.S.C. App. §§ 2061-2168 (1951 & Supp. 1983), the government essentially commandeered all of the respondents' capacity to produce Agent Orange. *Id.*

3. *Effectiveness and legality of herbicide use.* The herbicide program was effective in serving important military objectives, including reducing the risk of ambush created by dense vegetation surrounding U.S. bases and supply routes. The military concluded that,

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[1] The procurement and manufacture of the herbicides are discussed more fully in respondents' opposition in *Stephenson* v. *Dow Chemical Co.*, No. 08-461.

as a result of the program, "our forces have been better able to accomplish their mission with significantly reduced U.S. and Vietnamese casualties." C.A. App. 1376.

Nevertheless, as the government had expected from the outset,[2] the herbicide program proved controversial. As the district court noted: "Opposition to this herbicide program by scientists and others on the ground that it violated international law and was improper because it would cause harm to persons and land was brought to the attention of the United States beginning in early 1961." Pet. App. 209a. The Executive Branch, however, consistently concluded that the herbicide program produced substantial military benefits and was legal under existing treaties and customary international law. *See id.* at 400a-410a. In 1961, Secretary Rusk advised President Kennedy that "the use of defoliant does not violate any rule of international law concerning the conduct of chemical warfare and is an accepted tactic of war." C.A. App. 1339. In 1969, when a resolution was proposed in the United Nations General Assembly declaring that the 1925 Geneva Protocol[3] banned at least some herbicide use in warfare, the U.S. delegation rejected that interpretation, maintaining

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[2] C.A. App. 1339 (Secretary Rusk observing that "[w]e will, of course, be the object of an intense Communist 'germ warfare' campaign which may be picked up by some neutrals").

[3] Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571. The United States ratified the Protocol in 1975, after U.S. participation in the Vietnam conflict had ended. Although in the district court petitioners relied on the Protocol in support of their war-crimes claims (*see* Pet. App. 430a-437a), they have not done so on appeal or in this Court.

that "[c]hemical herbicides ... which were unknown in 1925, could not be included" within the scope of the prohibition. *Id.* at 1394.

Congress was well aware of the controversy surrounding the herbicide program yet continued to appropriate funds for herbicide procurement.[4] Proposals by members of Congress to curtail funding to the program failed by wide margins.[5]

When President Nixon transmitted the 1925 Geneva Protocol to the Senate for ratification in 1970, Secretary of State Rogers confirmed that "[i]t is the United States' understanding of the Protocol that it does not prohibit the use in war of ... chemical herbicides." Pet. App. 30a. And in 1975, when President Ford issued an Executive Order renouncing "as a matter of national policy, first use of herbicides in war," he nevertheless reiterated the consistent U.S. position on the legality of such use. *Id.* at 30a.

4. *The end of the herbicide program.* In June 1966, a government study on the long-term health effects of certain pesticides and herbicides, including 2,4,5-T, uncovered evidence of birth defects in mice.

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[4] *See* S. Rep. No. 91-1016, at 85-87 (1970) (in military appropriations bill, establishing levels of expenditures for development and procurement of herbicides).

[5] *See* 116 Cong. Rec. 30,036-30,055 (1970) (amendment prohibiting expenditures for the military application of anti-plant chemicals rejected by Senate vote of 62-22); *id.* at 30,222-30,227 (amendment prohibiting expenditures for the use of chemicals for crop destruction rejected 48-33); *see also id.* at 30,005 (statement of Sen. McIntyre) ("For whatever the possible side effects of our herbicide program, its primary contribution is indisputable: it has saved the lives of Americans in Vietnam.").

Pet. App. 11a. This study, known as the Bionetics Study, was received by the National Cancer Institute, a component of the National Institutes of Health, in September 1968 and was publicly released in October 1969. *Id.* The government temporarily banned use of Agent Orange in 1970 and definitively terminated the herbicide program in 1971. *Id.*

5. *Post-war relations with Vietnam.* American participation in the Vietnam conflict ended in January 1973. Pet. App. 7a. After the fall of Saigon in 1975, the United States severed relations with Vietnam and imposed a trade embargo. *Id.*

The embargo remained in place for two decades, until it was lifted by President Clinton. Pet. App. 7a. In 1995, the United States and Vietnam agreed to settle claims between the countries arising out of "the nationalization, expropriation, or taking of, or other measure directed against, properties, rights, and interests of the parties and their citizens during and after the war." *Id.* at 7a-8a (internal quotation marks omitted). That agreement makes no provision for the settlement of claims arising out of the use of Agent Orange. *Id.*

The United States and Vietnam continue to discuss issues arising out of the war. A 2002 Memorandum of Understanding provides for scientists representing both governments to cooperate to determine the effects, if any, of Agent Orange on people and ecosystems. Pet. App. 8a. In May 2007, Congress appropriated $3 million in aid towards health and environmental

issues in Vietnam,[6] though the U.S. government has never agreed with Vietnam's claims regarding a purported link between Agent Orange or dioxin and the allegedly widespread health effects suffered by the Vietnamese population.[7] In June 2007, Vietnamese President Triet met with President Bush to discuss a variety of issues, including human rights, trade, POWs, and Agent Orange.[8]

6. *The complaint.* Petitioners are a non-profit association and several Vietnamese individuals (including former members of the North Vietnamese army) seeking to represent a class of Vietnamese nationals allegedly injured by exposure to Agent Orange deployed during the Vietnam conflict. C.A. App. 37-39, 65, 75, 86-89. Petitioners do not claim that they were injured by the active components of Agent Orange, but rather by dioxin, a byproduct of the manufacturing process present in Agent Orange at extremely low levels.

Invoking the ATS, petitioners claim that, by supplying Agent Orange to the U.S. military, respondents aided and abetted the military's commission of various war crimes (C.A. App. 87, 90), including: (1) violation of

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[6] *See* McCool, *Vietnam President seeks 'fair' treatment by U.S.*, Reuters News, June 18, 2007; *see also* Pet. App. 35a.

[7] *See, e.g.*, McCool, *supra* ("The United States maintains there is no scientifically proven link between dioxin and the three million people Vietnam estimates are disabled or suffer from its effects."); U.S. Statement of Interest 11 n.11, *In re Agent Orange Prod. Liab. Litig.*, MDL No. 381 (E.D.N.Y. filed Jan. 12, 2005) (citing judicial opinions finding insufficient evidence of harm to human health caused by Agent Orange).

[8] Baker, *Bush Prods Vietnamese President On Human Rights And Openness*, Wash. Post, June 23, 2007, at A2.

Article 23(a) of the 1907 Hague Regulations, which proscribes "employ[ing] poison or poisoned weapons";[9] (2) violation of Article 23(e) of the 1907 Hague Regulations, which proscribes employing war material "calculated to cause unnecessary suffering";[10] and (3) the international customary law norm of proportionality, codified in Article 6(b) of the London Charter, which proscribes the "wanton destruction of cities, towns or villages or devastation not justified by military necessity."[11]

Additionally, petitioners assert several tort claims under New York law, including assault and battery, infliction of emotional distress, negligence, and strict products liability. C.A. App. 93-98. Petitioners seek compensatory and punitive damages, as well as injunctive relief directing respondents to provide environmental remediation. *Id.* at 100-101.

The district court (Weinstein, J.) made available to petitioners the voluminous discovery record in *In re Agent Orange Product Liability Litigation*, MDL-381, litigation brought by U.S. military veterans and their families that was settled in 1984. Pet. App. 34a, 47a-48a. The court also allowed discovery into matters particular to this case. C.A. App. 223-224.

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[9] Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 36 Stat. 2277, 2302 (Oct. 18, 1907) ("Hague Regulations").

[10] *Id.*

[11] The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 Stat. 1546, 1547 ("London Charter").

Respondents filed several dispositive motions, and both sides submitted extensive expert opinions on the relevant points of international law.[12] The United States filed a statement of interest seeking dismissal of the ATS claims on the grounds, *inter alia*, that they were nonjusticiable and that they also failed the standard set out in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004), where this Court admonished that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."

7. *District court's decision.* Judge Weinstein dismissed the ATS claims in their entirety, holding that none satisfied the standard set out in *Sosa*. With regard to petitioners' poison claim, he held that the "imprecise scope" of the Hague Regulations' prohibition on the use of poison and the "uncertainty as to whether that prohibition even applies to lethal chemical weapons designed to kill human beings" are fatal to any claim that the poison proscription "sets forth a sufficient definite prohibition" that could satisfy *Sosa*. Pet. App. 427a. Judge Weinstein added that even if the poison proscription were broadly construed, it would not apply to respondents' provision of herbicides "regardless of whether they have collateral harmful consequences on humans" because "this proscription would reach only those materials that were intentionally de-

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[12] Petitioners' experts were Professors George P. Fletcher and Jordan J. Paust. Respondents' experts were Professors Kenneth Howard Anderson, Jr. and W. Michael Reisman.

signed to inflict poisoning as a means of combat." *Id.* (internal quotation marks omitted).

Judge Weinstein also granted summary judgment for respondents on the state-law claims, ruling that those claims were barred by the government contractor defense, as the court had ruled in a related case brought by U.S. veterans. Pet. App. 176a.[13]

8. *Court of appeals' decision.* The court of appeals affirmed the dismissal of the ATS claims.[14] The court held that "Plaintiffs' claim that 'defendants manufactured[ed] and suppli[ed] a[n] herbicide laced with poison' and used as a defoliant fails to satisfy the standard set forth by the Supreme Court in *Sosa* for recognition of a tort in violation of international law." Pet. App. 32a (alterations in court of appeals' decision).

The court explained that the Hague Regulations' poison proscription is "certainly categorical, ... but its scope is nevertheless undefined and has remained so for a century." Pet. App. 26a. The court relied on, among other authorities, the International Court of Justice's decision recognizing that the Hague Regulations nowhere define the critical term "poison" and that "'different interpretations exist on the issue.'" *Id.* (quoting Threat or Use of Nuclear Weapons, Advisory Op. No. 95, 1996 I.C.J. 226, 248 ¶ 55 (July 8) ("*Nuclear*

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[13] The district court, however, rejected respondents' alternative grounds for dismissal, including respondents' contention, supported by the United States, that the ATS claims are nonjusticiable. *See* Pet. App. 283a-317a.

[14] The same panel issued decisions that day in favor of respondents on the government contractor defense and federal officer removal in the U.S. veterans' cases.

Weapons Opinion")). The court further stated that, at most, petitioners had established a "customary international norm proscribing the *purposeful use of poison* as a weapon against human beings." *Id.* at 32a (emphasis added). That norm, however, was "inapplicable in this case" (*id.*) because petitioners "nowhere allege that the government intended to harm human beings through its use of Agent Orange" (*id.* at 26a). The court concluded that there is a "lack of a consensus in the international community with respect to whether the proscription against poison would apply to defoliants that had possible unintended toxic side effects, as opposed to chemicals intended to kill combatants." *Id.*

The court of appeals also rejected petitioners' claim based on the norm proscribing war material "calculated to cause unnecessary suffering" and the related norm of proportionality. Pet. App. 28a. The court observed that even petitioners' expert acknowledged that those norms entail case-by-case balancing of competing interests and therefore lack the definite and specific content required by *Sosa*. *Id.* at 31a. The court also held that violation of those norms requires a level of "intentionality that Plaintiffs cannot establish." *Id.* at 31a (referring to the Hague Regulations' prohibition on war material "*calculated*" to cause unnecessary suffering and the proportionality norm's proscription on "*wanton* destruction").

With respect to the state-law claims, the court of appeals upheld the district court's grant of summary judgment to respondents on the government contractor defense. Pet. App. 34a. The court of appeals' decision adopted the analysis in the companion decision involving U.S. veterans. *Id.*

ARGUMENT

Petitioners' allegations of error do not merit this Court's review. Petitioners make no assertion that the Second Circuit's rejection of their ATS claims conflicts with the decision of another court of appeals. Instead, petitioners contend (Pet. 7) that the Second Circuit's decision conflicts with this Court's decision in *Sosa*. Petitioners, however, make no claim that the Second Circuit misapprehended the *Sosa* standard in any particular manner. Petitioners' argument thus reduces to a request that this Court correct the Second Circuit's application of settled law to the facts of this particular case, a submission that rarely warrants this Court's review.

Moreover, the court of appeals was eminently correct in holding that petitioners' claims do not satisfy *Sosa*'s "demanding standard." 542 U.S. at 738 n.30. Petitioners have failed to show that there has ever been an international consensus that the 1907 Hague Regulations' proscription on "employ[ing] poison or poisoned weapons" extended so broadly as to prohibit the use of an herbicide to kill vegetation, which use allegedly had unintended but foreseeable toxic effects on humans. And petitioners' "unnecessary suffering" and "proportionality" claims rely upon norms that even international tribunals consider too difficult to administer; those norms manifestly lack the "definite content" and "clear definition" required by *Sosa*, 542 U.S. at 732 & 733 n.21. Petitioners' allegations of case-specific procedural error are likewise unworthy of review. They are also unfounded; the court of appeals properly credited all of petitioners' factual allegations and applied the correct standard on a motion to dismiss.

Prudential considerations further weigh against this Court's review. Even if petitioners' ATS claims satisfied *Sosa*'s acceptance and specificity requirements, several alternative grounds support their dismissal. Petitioners' claims depend on corporate and aiding-and-abetting liability, but neither is cognizable in an ATS action. In addition, the prudential considerations noted in *Sosa*, including case-specific deference to the Executive Branch, independently counsel against recognizing a cause of action here. Moreover, because petitioners' claims are cognizable only insofar as they are incorporated into federal common law, they are subject to federal common law defenses. Here, the government contractor defense and other federal defenses bar petitioners' claims under the ATS just as they bar their state-law claims. Petitioners' claims are also nonjusticiable because they would necessitate second-guessing the Executive's decision to employ Agent Orange on the battlefield in Vietnam and would interfere with the Political Branches' prerogatives in conducting diplomacy and resolving disputes with Vietnam.

The Second Circuit's resolution of petitioners' state-law claims also does not merit review. For the reasons given in respondents' opposition to the petition in *Stephenson* v. *Dow Chemical Co.*, No. 08-461, the court of appeals' decision on the government contractor defense accords with this Court's leading decision on the issue and does not conflict with that of another court of appeals. But even if the U.S. veterans' state-law claims could proceed, those of the Vietnamese nationals may not. As damages claims by foreign nationals alleging injury from the wartime conduct of the U.S. military and its contractors, petitioners' claims are preempted by the federal foreign affairs power.

I. PETITIONERS ASSERT NO SPLIT OF AUTHORITY BETWEEN THE COURTS OF APPEALS, AND THEIR REQUEST FOR ERROR CORRECTION UNDER *SOSA* DOES NOT MERIT REVIEW

Petitioners notably do not contend that the Second Circuit misapprehended the *Sosa* standard or applied it in a manner that creates a conflict with another court of appeals. Rather, petitioners argue that the court of appeals misapplied *Sosa* to their particular international law claims. Petitioners also make the unlikely argument that the court of appeals ignored the standard that applies on a motion to dismiss. These contentions are without merit.

A. The *Sosa* Standard

This Court made clear in *Sosa* that the ATS is "a jurisdictional statute creating no new causes of action." *Sosa*, 542 U.S. at 724. At the same time, federal courts possess authority to recognize, as a matter of federal common law, a "narrow set" of actions derived from the law of nations. *Id.* at 721.

Sosa repeatedly admonished courts to exercise "great caution," 542 U.S. at 728, "restraint," *id.* at 725, and "vigilant doorkeeping," *id.* at 729, and to apply a "demanding standard," *id.* at 738 n.30, in determining which asserted international-law norms to recognize as actionable under federal common law. This restraint is necessary given the circumscribed role federal courts have in creating common law and recognizing private rights of action without legislative guidance, *id.* at 726-727, and the risks of "impinging on the discretion of the Legislative and Executive branches in managing foreign affairs," *id.* at 727. Accordingly, any claim based on the "present-day law of nations" must, at a minimum, be "accepted by the civilized world and defined

with a specificity comparable to the features of the 18th-century paradigms" described by Blackstone and accepted at the time of the ATS's enactment, *id.* at 725: "violation of safe conducts, infringement of the rights of ambassadors, and piracy," *id.* at 724; *see also id.* at 732 (courts should not recognize norms "with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted").

Applying this standard, *Sosa* rejected the "arbitrary arrest" claim asserted by plaintiff Alvarez, a Mexican national who allegedly had been abducted from Mexico by persons hired by the DEA, detained for less than one day, and then transferred to federal custody to stand trial in the United States. The Court reasoned that, whether or not there was a sufficiently accepted norm against arbitrary detention, violation of such a norm would require "a factual basis beyond relatively brief detention in excess of positive authority." 542 U.S. at 737. The Court concluded: "It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authority and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." *Id.* at 738.

B. The Second Circuit Correctly Determined That Petitioners' Poison Claim Fails *Sosa*'s Standard

Petitioners' central claim is that respondents' provision of Agent Orange to the U.S. military—while allegedly knowing that it contained "unnecessary and excessively high levels of dioxin"—aided and abetted the military's violation of the Hague Regulations' proscrip-

tion on "poison or poisoned weapons."[15] Pet. 2, 9. But a century of state practice refutes petitioners' novel assertion that the poison proscription extends so far as to prohibit the use of an herbicide to kill vegetation, even if that use has unintended but allegedly foreseeable toxic effects on humans. And petitioners certainly have not shown that this was the understanding of the poison proscription at the time of the Vietnam conflict.[16] Like the plaintiff in *Sosa*, petitioners "cite[] little authority that a rule so broad ha[d] the status of a binding ... norm." 542 U.S. at 736.

1. The Poison Proscription Fails The *Sosa* Standard Because It Is A Highly General Norm, Whose Operative Scope Is Vague And Has Been Applied Narrowly

There is no dispute that international law has long prohibited the use of "poison" during war. That ancient norm, however, has always existed at a high level of generality. C.A. App. 2084 (Anderson). Beyond a handful of specific, historically accepted applications of that norm—such as the prohibitions against poisoned arrows and bullets and the poisoning of wells—there is

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[15] Petitioners make no argument that international law prohibits the military use of herbicides per se. *See* Pet. 6. Nor do they dispute that vegetation providing enemy cover and crops used by enemy forces are permissible military targets. *See* C.A. App. 1308-1311 (Anderson).

[16] Because petitioners' claims arise out of the Vietnam conflict, they must establish that an actionable norm was in place at that time. *See* Pet. *i* (recognizing that the *Sosa* issue is analyzed in terms of international law at the time of the Vietnam conflict); *see also* C.A. App. 1284 (Anderson) ("[I]t is crucial to look at the law that was in force when the disputed actions took place.").

not now, and never has been; a consensus in the international community as to what the poison proscription encompasses. *Id.* As the International Court of Justice (ICJ) recognized in a 1996 decision holding that the poisonous radioactive fallout from nuclear weapons does not violate the poison proscription, the 1907 Hague Regulations nowhere define the operative term "poison" and "different interpretations exist on the issue." *Nuclear Weapons Opinion*, 1996 I.C.J. 226 ¶ 55. Commentators have also noted this lack of consensus:

> The Hague interdiction of poison has been subject to so many differences of opinion among legal authorities in relation to chemical-biological agents that it becomes impossible to point with any certainty to its relevance as to any prohibitory effect in the chemical-biological field.... [D]isputes exist as to whether certain agents are poison so as to fall within this rule; whether agents would be encompassed if not in existence prior to 1907; and whether the rule was intended to apply to chemical-biological weapons in any event.

Thomas & Thomas, *Legal Limits on the Use of Chemical and Biological Weapons* 57 (1970).[17] Thus, while an international norm against poisoning exists, that norm exists at too high a level of generality to be actionable under *Sosa*. *See Sosa*, 542 U.S. at 736 n.27 (holding that Alvarez's evidence "does show that many nations rec-

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[17] As a result, a treatise published by the International Committee of the Red Cross comments that Article 23(a)'s prohibition "is of mainly historical interest." Kalshoven & Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* 42 (ICRC 2001).

ognize a norm against arbitrary detention, but that consensus is at a high level of generality"); *id.* at 732 (requiring that a norm be "sufficiently definite").

Petitioners seek to surmount this obstacle by invoking the "plain" meaning of the word "poison" and suggesting that courts need only conclude that dioxin falls within that definition to let their claim go forward. Pet. 15. That approach is not one that has been followed in recognizing proscriptions against the use of weapons or material in wartime. *See* C.A. App. 2089-2090 (Anderson). Rather, as the ICJ recognized, state practice has been to construe the poison proscription narrowly and to have specific weapons "declared illegal by specific instruments." *Nuclear Weapons Opinion*, 1996 I.C.J. at 248 ¶ 57.[18]

For example, as noted above, although the use of nuclear weapons would cause massive poisonous radiation, the ICJ determined that such use would not run afoul of the poison proscription. *See Nuclear Weapons Opinion*, 1996 I.C.J. at 248 ¶¶ 53-57. Similarly, the parties to the 1907 Hague Regulations did not even agree that the poison proscription applied to the use of *poisonous gas weapons* to kill enemy troops in World War I. The Germans, British, and French all used poison gas extensively in that war, less than a decade after

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[18] *See also* Written Statement of the United Kingdom, Nuclear Weapons Case ¶¶ 3.88-3.89 (June 16, 1995), *available at* http://www.icj-cij.org/docket/files/95/8802.pdf ("[I]t is a fundamental principle of the law of treaties that a prohibitive rule, purporting to exclude a particular activity from the scope of permissible State practice, must be clearly stated.... [O]ne cannot, therefore, infer from general words, or a treaty of general application, a prohibitive rule of specific content[.]").

adoption of the Hague Regulations, and the United States was prepared to do so too, although the Armistice made that unnecessary. C.A. App. 1286 (Anderson). Those states thought it necessary later to negotiate a specific treaty, the 1925 Geneva Protocol, to outlaw the use of poisonous gas as a weapon. *See id.* at 1286-1287 (Anderson) (this "state practice demonstrates that the term in fact has had a narrow legal meaning that has not included such weapons.").[19]

Thus, while the poison proscription has served as an important general norm in the law of war, it is not itself actionable; prohibitions against the use of poison can be enforced under *Sosa* only if and when they are embodied by the international community in concrete prohibitions regarding specific weapons. There was no such prohibition on herbicides with toxic effects in place at the time of the Vietnam conflict. Nor is there one even today; notably, the wartime use of herbicides

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[19] Petitioners' challenge to this account (Pet. 17-18) is unconvincing. The Versailles Commission's report did list the "use of deleterious and asphyxiating gases" as a violation committed during World War I, but petitioners merely speculate, and unpersuasively, that this was a reference to the 1907 Hague Regulations' poison proscription. The reference was more likely to the Hague Gas Declaration of 1899, which prohibited "the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases." *See* Thomas & Thomas, *supra*, at 46-49, 57 (the Gas Declaration's "sole object" language rendered it of "little usefulness," thus necessitating the 1925 Geneva Protocol). In any event, the weight of authority is against petitioners. *See, e.g.*, C.A. App. 1287 (Anderson) (noting that the 1956 U.S. Army Field Manual stated that the poison proscription did not encompass poisonous gases); *id.* at 1146 (Reisman); Kelly, *Gas Warfare in International Law*, 9 Mil. L. Rev. 1, 44 (1960); McDougal & Feliciano, *Law and Minimum Public World Order* 619 (1960, repr. 1994); Detter, *The Law of War* 252-253 (2d ed. 2000).

is not prohibited by the modern Chemical Weapons Convention of 1993, "even ... if the (secondary) effect of such use were the killing or harming of people." Krutzch & Trapp, *A Commentary on the Chemical Weapons Convention* 30 (1994).

2. Petitioners' Claim Independently Fails Because There Is No Allegation That Agent Orange Was Used With The Purpose Of Poisoning Human Beings

Petitioners' claim also fails for the independent reason that the proscription on "employ[ing] poison or poisonous weapons" applies only to conduct undertaken with the *purpose* of poisoning human beings. Thus, even putting aside the fact that the anti-poisoning norm is too general to satisfy *Sosa*, petitioners' allegation of knowing but unintentional poisoning is insufficient to state a violation of that norm. *See Sosa*, 542 U.S. at 738 (holding that, whether or not there was a binding norm against arbitrary detention, "[i]t is enough to hold that a single illegal detention of less than a day ... violates no norm of customary international law so well defined as to support the creation of a federal remedy"). There has never been a widely accepted and specific bar on use of chemicals designed and deployed for other purposes, such as defoliation, even if that use might foreseeably result in injury to humans.[20]

As reflected in the historically accepted applications of the poison proscription (*e.g.*, dipping arrows or

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[20] *See* C.A. App. 1147 (Reisman) ("Even if herbicides could have harmful consequences for humans, such substances would not be considered poisonous under Article 23(a) if the intentional design of the material was not to inflict poisoning as a means of combat." (internal quotation marks omitted)).

bullets in poison or contaminating wells with corpses), the anti-poisoning norm reaches only conduct designed to kill people by means of poisoning. In its submission to the ICJ in the *Nuclear Weapons* case, the United States stated its longstanding view that Article 23(a)'s poison proscription "was not intended to apply, and has not been applied, to weapons that are designed to injure or cause destruction by other means, even though they may also create toxic byproducts." C.A. App. 1288 (Anderson) (quoting U.S. submission to the ICJ); *see also id.* (citing similar British submission). The ICJ agreed that the foreseeable poisonous effects of nuclear weapons are insufficient to bring those weapons under the poison proscription. That proscription, the court observed, has been "understood, in the practice of States, ... as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate." *Nuclear Weapons Opinion*, 1996 I.C.J. at 248 ¶ 55. Even under the Chemical Weapons Convention of 1993, "[h]erbicides will not be regarded as chemical weapons if used with an intent to destroy plants." Krutzch & Trapp, *supra*, at 30.

Commentators confirm that the intent to poison humans is essential to the poison proscription. *See, e.g.*, Oeter, *Methods and Means of Combat*, in *The Handbook of Humanitarian Law in Armed Conflicts* 149 (Fleck ed. 1995) (stating that "[o]nly in so far as the poisoning effect is the intended result of the use of the substances concerned does the use of such munitions qualify as a use of 'poisonous gases'" and contrasting situations where "the asphyxiating or poisoning effect is merely a side-effect of a physical mechanism in-

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tended principally to cause totally different results");[21] Detter, *supra*, at 252 (poison proscription covers "weapons *deliberately* contaminated with germs or poisonous agents" (emphasis added)); Thomas & Thomas, *supra*, at 53 (poison proscription "relates to the use of poison to *injure or destroy* the *person* of the enemy" (emphasis added)).

Petitioners do not allege that respondents (or the U.S. military) purposefully used Agent Orange to poison human beings. Rather, they allege only that respondents knew that dioxin was toxic to humans and that "precautions in the manufacturing process ... could sharply limit the risk of contamination." C.A. App. 55, 60.[22] But as demonstrated by the ICJ's *Nuclear Weapons* opinion, knowledge of poisonous effects is insufficient to violate the poison proscription. Recognizing petitioners' claim of unintended but foreseeable poisoning would contravene *Sosa*'s admonition that courts do

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[21] As Anderson points out, Oeter's discussion addresses both the Hague Regulations' poison proscription and the 1925 Geneva Protocol. C.A. App. 1289 n.48.

[22] Despite petitioners' belated assertion (*see* Pet. 13 ("From [respondents'] knowledge, the court can infer intent to poison even though specific intent is not required.")), their amended complaint nowhere alleges that respondents acted with the intent to poison humans. Elsewhere, the petition accurately summarizes the complaint's allegations against respondents as involving only *knowledge* of toxicity. *See, e.g.*, Pet. 2 ("respondents ... manufactured and supplied these chemicals to the government knowing they contained unnecessary and excessively high levels of dioxin"); *id.* at 4 n.1 ("respondents ... knew of the presence and toxicity of dioxin in Agent Orange ... but delivered the highly contaminated product to the government anyway"); *id.* at 13; *see also* C.A. App. 1737-1738 (petitioners' expert recognizing that Agent Orange was "not used as [a] means of directly attacking enemy troops").

not have a "mandate to seek out and define new and debatable violations of the law of nations." 542 U.S. at 728.

3. Petitioners' Other Allegations Of Error Lack Merit

As shown above, there has never been an international consensus that the poison proscription applied to respondents' alleged conduct. Petitioners seek to sidestep that point by faulting the court of appeals for making two supposed errors. Neither allegation has merit.

First, petitioners assert that the court of appeals ignored the applicable standard for a motion to dismiss, failed to credit petitioners' factual allegations, and, as a result, considered only the legality of herbicides per se, rather than the legality of herbicides containing a poisonous substance, dioxin. Pet. 5-6, 20. That contention is meritless. The court of appeals properly identified the standard of review that applies on a motion to dismiss. *See* Pet. App. 16a. The court also properly credited all of petitioners' factual allegations, including their allegation that respondents supplied, and the U.S. military used, an "herbicide laced with poison." *Id.* at 32a.[23] Had the court not accepted petitioners' allegations regarding the poisonous properties of dioxin, there would have been little reason for it to have held, for example,

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[23] Because the court of appeals accepted petitioners' allegation of an "herbicide laced with poison" (Pet. App. 32a), there was nothing improper about that court's generic references to Agent Orange as an "herbicide." *See* Pet. 5-6. Petitioners themselves refer to Agent Orange in this manner—as an herbicide that contained a poison. *See id.* at 2, 6. And contrary to petitioners' assertion (*id.* at 4 n.1), the district court also accepted petitioners' allegation that "[d]ioxin is a poison." Pet. App. 232a.

that alleged poisonous effects are insufficient because the poison proscription applies only where there is an *intent* to poison human beings. *Id.* There is no plausible claim that the court of appeals somehow missed the central issue in this case.

Second, petitioners argue (Pet. 10-12) that two opinions written by Department of Defense officials[24] demonstrate that, at the time of the Vietnam conflict, the Hague Regulations' poison proscription encompassed the use of herbicides with unintended toxic effects. Petitioners' heavy reliance on those opinions is unwarranted.

As the United States explained in its Second Circuit amicus brief ("U.S. Br."), the Cramer and Buzhardt opinions are fully consistent with the government's understanding that the Hague Regulations' poison proscription does not apply to the use of herbicides to destroy foliage and enemy crops, even if such use had unintended but foreseeable toxic effects on humans. *See* U.S. Br. 26 n.5. Cramer's opinion, for instance, concluded that the "United States is not bound by any treaty which specifically excludes or restricts the use of chemicals, *whether toxic or nontoxic*, in time of war." C.A. App. 1490 (emphasis added); *see also id.* at 1491 (proceeding to analyze the issue assuming, counterfactually, that "Article 23(a) is held to apply to toxic chemical substances").

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[24] Defense Department General Counsel J. Fred Buzhardt issued his opinion letter to the Senate Committee on Foreign Relations on April 5, 1971, in the context of the Committee's hearings on the 1925 Geneva Protocol. The letter attached an earlier opinion by Major General Myron C. Cramer, The Judge Advocate General, War Department, dated March 1945.

In addressing the legality of herbicide use, both Cramer and Buzhardt addressed a fact pattern susceptible to categorical analysis. They concluded that it would be legal to use herbicides "for defoliation or the destruction of crops, provided that their use against crops does not cause such crops as food to be poisoned nor cause human beings to be poisoned by direct contact, and such use must not cause unnecessary destruction of enemy property." C.A. App. 1485 (Buzhardt); *see also id.* at 1490 (Cramer) (similar). Petitioners argue (Pet. 11-13) that Cramer and Buzhardt intended a negative inference to follow—namely, that if the use of herbicides against vegetation or enemy crops results (even unintentionally) in the poisoning of humans, then such use is prohibited by international law. But that interpretive leap is unsubstantiated. Cramer, for example, made clear that he was not expressing an ultimate conclusion on that issue, stating: "Should further experimentation disclose that they [herbicides] are toxic to human beings, I will be pleased to express my opinion on the facts which may be presented for consideration." C.A. App. 1490. Buzhardt did not analyze the fact pattern of an herbicide with toxic effects, and his opinion nowhere endorsed the negative inference petitioners urge.[25] The Cramer and Buzhardt opinions thus lend no support to petitioners' argument.

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[25] Even were petitioners' negative inferences correct, nothing supports the notion that such a prohibition would be based on Article 23(a)'s poison proscription. Rather, when Buzhardt mentioned the issue of whether herbicides are "harmless to man," he suggested that the issue would be relevant under Article 23(e)'s prohibition on weapons "calculated to cause unnecessary suffering." C.A. App. 1487. As discussed below, however, Article 23(e)'s proscription lacks the definiteness necessary under *Sosa*. *See in-*

C. The Court Of Appeals Correctly Determined That Petitioners' Claims Based On The Norm Of Proportionality And The Related Norm Against "Unnecessary Suffering" Fail Under *Sosa*

Petitioners also argue that the court of appeals erred in affirming the dismissal of their claims based on the norm of proportionality[26] and the Hague Regulations' prohibition on the use of war material "calculated" to cause "unnecessary suffering." Pet. 18. The court of appeals, however, correctly held that "[t]hese norms are simply too indefinite to satisfy *Sosa*'s specificity requirement." Pet. App. 31a. The court was also correct that both norms require mental states that petitioners have not alleged. *Id.* at 32a.

First, these norms reflect broad aspirational goals rather than specific, actionable obligations of the kind that could satisfy *Sosa*'s requirements. As petitioners' expert acknowledged:

> [N]orms that depend on modifiers such as "disproportionate" or "unnecessary" ... invite a case-by-case balancing of competing interests. When the balancing of competing interests governs the interpretation of a norm, black-letter rules become vague and easily manipulated. They lose the definite and specific con-

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fra pp. 26-29. Likewise, Cramer discussed the issue of herbicides with potentially toxic effects in the context of a customary international law prohibition on "poisonous gases and those causing unnecessary suffering." C.A. App. 1490.

[26] This norm prohibits "wanton destruction of cities, towns or villages, or devastation not justified by military necessity." *See* London Charter art. 6(b), 59 Stat. at 1547.

> tent *Sosa* seems to demand for recovery under the ATS.

C.A. App. 1717 (Fletcher). Two leading commentators have characterized Article 23(e)'s "unnecessary suffering" prohibition as "too vague to produce by itself a great many practical results." Kalshoven & Zegveld, *supra*, at 41-42. Stefan Oeter, a scholar petitioners rely upon in this context (Pet. 18-19), observes with respect to "unnecessary suffering" that it is "difficult to find an adequate description of the effects of weaponry which are intended to be outlawed by the choice of that wording." Oeter, *supra*, at 115.[27]

Similarly, with respect to the proportionality norm, the Final Report to the International Criminal Tribunal for Yugoslavia (ICTY) Prosecutor on the NATO bombing in Kosovo stated:

> The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied.... It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.

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[27] Petitioners also refer to "superfluous injury" (Pet. 18-19), but that concept was introduced by Optional Protocol I to the Geneva Conventions, which came into force only in 1979 and to which the United States is not a party. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, 1125 U.N.T.S. 3.

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ¶ 48 (June 13, 2000).[28] Such a norm is manifestly not one defined with the specificity required by *Sosa*.[29]

Second, the court of appeals correctly held that these claims fail for the independent reason that they require mental states that petitioners do not allege. The proportionality norm prohibits "*wanton* destruction." 59 Stat. at 1547 (emphasis added). Its violation requires "obvious intentional depravity." C.A. App. 1302 (Anderson). Similarly, Article 23(e) of the Hague Regulations proscribes the use of war material "*calculated* to cause unnecessary suffering." 36 Stat. at 2302 (emphasis added). This refers to war material designed to

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[28] *See also* Kalshoven & Zegveld, *supra*, at 46 (noting the "lack of precision inherent in [the proportionality norm]"); C.A. App. 1301 (Anderson) (deciding whether military action was proportional is an "inherently open-ended, imprecise and subjective" task).

[29] Petitioners argue (Pet. 19) that because they have alleged that the dioxin in Agent Orange served no "military use," the application of these norms is clear in this case and would require no balancing of competing interests. The issue, however, is not simply whether some feature of a particular instrument of war serves a "military use," but also the effort necessary to change or remove the challenged feature. Respondents, for instance, would present evidence that reducing dioxin levels would have slowed the production process, thus harming the military's interest in rapid production of Agent Orange. Thus, adjudicating petitioners' claims would necessarily require the uncertain balancing of interests that renders these norms unenforceable under *Sosa*.

> cause additional, and unnecessary, injury to a combatant *already* rendered *hors de combat* by some other means. Thus, for example, a bullet treated with an agent designed to inflame a wound is illegal because the bullet will suffice to render the combatant *hors de combat* and the inflammation is superfluous and unnecessary.

C.A. App. 1290 (Anderson). Even petitioners do not go so far as to suggest that the U.S. government deployed Agent Orange with the deliberate purpose of causing wanton harm, nor could they. Given these necessary mental states, petitioners' allegation that respondents supplied an herbicide with unintended, foreseeable toxic side effects is insufficient.

II. Several Alternative Grounds Support Dismissal Of Petitioners' ATS Claims

Prudential considerations also weigh against granting petitioners' request for review. Even if petitioners were correct that their claims satisfied *Sosa*'s acceptance and specificity requirements, several alternative grounds would warrant dismissal of their claims.[30]

First, under *Sosa*, a court must ascertain not only whether international law specifically proscribes the conduct alleged, but also "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued." 542 U.S. at 732 n.20. Here, petitioners' claims fail because interna-

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[30] The district court rejected these alternative arguments, and the court of appeals did not reach them given its affirmance on other grounds. *See* Pet. App. 33a-34a.

tional law has never extended liability for war crimes to corporations. *See* C.A. App. 1312-1316 (Anderson). No corporation was prosecuted at Nuremberg, and even in the drafting of the modern Rome Statute, corporate liability was rejected for lack of international consensus. *See Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 321-326 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (explaining that, under *Sosa*, there is no widely accepted norm of corporate liability), *aff'd under 28 U.S.C. § 2109 in absence of a quorum sub nom. American Isuzu Motors, Inc.* v. *Ntsebeza*, 128 S. Ct. 2424 (2008).

Second, respondents are alleged only to have aided and abetted the U.S. military's violation of international law (rather than to have committed primary violations of their own). *See* C.A. App. 37, 83, 90. Aiding-and-abetting, however, is not cognizable in an ATS action. International law prescribes standards only for *criminal* aiding-and-abetting liability, and under federal common law the doctrine's applicability in the *civil* context is "at best uncertain." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994).[31]

Third, the "requirement of clear definition is not meant to be the only principle limiting the availability

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[31] *See also Sosa*, 542 U.S. at 726 (instructing courts to "look for legislative guidance before exercising innovative authority over substantive law"); Brief for the United States As Amicus Curiae, *American Isuzu Motors, Inc.* v. *Ntsebeza*, No. 07-919 (U.S. filed Feb. 11, 2008) (arguing that aiding-and-abetting liability is not cognizable in ATS actions). *But see Khulumani*, 504 F.3d at 260 (per curiam) (holding that aiding and abetting is cognizable in ATS actions).

of relief" in ATS actions. *Sosa*, 542 U.S. at 733 n.21. In deciding whether to recognize a cause of action, courts should consider various prudential factors, such as "legislative guidance," *id.* at 726; "the possible collateral consequences of making international rules privately actionable," *id.* at 727; and "case-specific deference to the political branches," *id.* at 733 n.21. Given the military determinations made by three Administrations, with Congress's support, to use Agent Orange in the Vietnam conflict, and given that Agent Orange is still the subject of ongoing diplomatic negotiations, a court should exercise its discretion against recognizing a cause of action here. *See* U.S. Br. 1 (seeking dismissal); *see also Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988) (courts should decline to read even facially applicable statutes to authorize intrusions "upon the authority of the Executive in military and national security affairs" absent evidence that "Congress specifically has provided otherwise").

Fourth, because ATS claims are cognizable, if at all, only as a matter of federal common law, the courts' imposition of liability must conform to federal policies, including those embodied in legislative enactments. Here, the government contractor defense that barred petitioners' state-law claims[32] should also preclude their ATS claims. *See generally Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988); *see also* U.S. Br. 39 (noting that a "huge damages award" in an ATS action would "wreak havoc on the United States military's ability to secure needed war materials at a reasonable cost"). Petitioners' claims are also barred by the policies expressed in the "combatant activities" exception to the

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[32] *See* Pet. App. 34a; *see also infra* pp. 34-35.

Federal Tort Claims Act, *see* 28 U.S.C. § 2680(j), which recognizes that "no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." *Koohi* v. *United States*, 976 F.2d 1328, 1337 (9th Cir. 1992). Imposing liability on contractors that supply the instruments of war would "create a duty of care where the combatant activities exception is intended to ensure that none exists." *Id.* (dismissing claims against manufacturer of air defense system used by U.S. navy in accidental shooting of Iranian aircraft).

Finally, petitioners' ATS claims are nonjusticiable. Petitioners' claims would necessitate second-guessing the Executive's military decision, backed by Congress, to use Agent Orange on the battlefield and would require an unprecedented judicial determination that the U.S. military (aided and abetted by respondents) committed systematic war crimes. *Cf. Winter* v. *Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 377 (2008) (stressing that the Court "gives great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest" (internal quotation marks omitted)).[33] Agent

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[33] *See also Bancoult* v. *McNamara*, 445 F.3d 427, 437 (D.C. Cir. 2006) (dismissing ATS action alleging that the U.S. government forcibly depopulated islands in the Indian Ocean: "If we were to hold that ... the executive's actions in depopulating the islands and constructing the [military] base had to comport with some minimum level of protections, we would be meddling in foreign affairs beyond our institutional competence."); *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974, 983 (9th Cir. 2007) (dismissing ATS action against Caterpillar for selling bulldozers to the Israeli military while allegedly knowing of their use to destroy Palestinian houses, where the U.S. government approved and financed each sale: "[The court] cannot intrude into our government's decision to

Orange is also the subject of ongoing diplomacy, and the adjudication of petitioners' claims would interfere with the Political Branches' prerogatives in making peace with Vietnam. *Cf. American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 421 (2003) (whether to "[v]indicat[e] victims injured by acts and omissions of enemy corporations in wartime is ... within the traditional subject matter of foreign policy"); *Joo* v. *Japan*, 413 F.3d 45, 50 (D.C. Cir. 2005) (governments have treated "private claims [arising from war] as ... counters, 'chips,' in international bargaining" (internal quotation marks omitted)).

III. The Second Circuit's Decision Upholding The Dismissal Of Petitioners' State-Law Claims Does Not Merit Review

The court of appeals' decision affirming the dismissal of petitioners' New York-law tort claims also does not merit review. As explained in respondents' opposition to the petition in *Stephenson*, which is adopted here, the court of appeals' analysis of the government contractor defense conforms to *Boyle* and does not conflict with the decision of another court of appeals.

In any event, this case would make a poor vehicle for reviewing the government contractor issue. First, the court of appeals' decision in the instant case contained no substantive discussion of the contractor defense, but rather referred to the discussion in the U.S. veterans' case. Pet. App. 34a (citing *In re Agent Or-*

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grant military assistance to Israel, even indirectly by deciding this challenge to a defense contractor's sales.").

ange Prod. Liab. Litig., 517 F.3d 76 (2d Cir. 2008), *petition for cert. pending*, 08-461).

Second, whether or not the government contractor defense issue is worthy of review in the veterans' cases, the Vietnamese petitioners' state-law claims are independently preempted for another reason. The Constitution entrusts the federal government with "full and exclusive responsibility" for the conduct of foreign affairs, *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941), and therefore preempts state action that interferes with the federal government's exercise of its foreign relations power, *see, e.g.*, *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968). As damages claims by foreign nationals alleging injury from the wartime conduct of the U.S. military and its contractors, petitioners' claims fall within the traditional ambit of federal, not state, competence. *See Garamendi*, 539 U.S. at 404, 416; *cf. Kwan* v. *United States*, 272 F.3d 1360, 1364 (Fed. Cir. 2001) (bilateral negotiations regarding compensation for Korean veterans are "consigned to the executive branch in its conduct of foreign relations"). The effects of Agent Orange are the subject of continuing diplomacy (alongside other issues such as human rights, trade, and POWs). Permitting petitioners' state-law claims to proceed—particularly in the form of the massive class action they propose—would necessarily "undercut[] the President's diplomatic discretion" and give him "less to offer and less diplomatic leverage as a consequence." *Garamendi*, 539 U.S. at 423-424 (internal quotation marks omitted). In light of New York's minimal interest in the matter, the federal foreign affairs power thus independently preempts petitioners' state-law claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 08-470

IN THE

Supreme Court of the United States

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, ET AL, PETITIONERS

v.

DOW CHEMICAL COMPANY, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Introduction:

In their Brief in Opposition to the Petition for Writ of Certiorari in this case, Respondents have made various allegations and arguments which require a reply. These points are listed below and are stated in order of their appearance in the Respondents' Brief

I. Respondents Continue to Mis-Characterized Petitioners' Complaint

Respondents, on page 1, make two blatant mis-characterizations of Petitioner's Complaint. First, they state that "Petitioners are a putative class of Vietnamese nationals . . . who allege that they were injured by exposure to herbicides used by the U.S. military. . ." during the Viet Nam War. As we have argued extensively in our Petition, this formulation misstates the true nature of Petitioners' claims. This is not a case about herbicides, per se, but about an herbicide that knowingly contained an excessive, avoidable and wholly unnecessary poison, dioxin, that has now caused serious injury and death not only to the Vietnamese but to thousands of U.S. veterans who served in that war. Moreover, dioxin was present in the herbicides manufactured by these respondents solely because it cost less to manufacture it in a manner which ensured high levels of dioxin were created in the production process.

Respondents are not the only ones to mis-characterize the complaint this way. Both the District Court and the Court of Appeals engage in the same

factual mis-characterization of the Petitioners' claims. As we have argued in our Petition, this error was such a departure from the accepted and usual course of judicial proceedings that it requires this Court, under its supervisory powers, to summarily reverse the granting of the motion to dismiss the Petitioners international law claims in this case.

The Respondents, also on page 1, knowingly misstate the central assertion in our complaint. That is, that respondents aided and abetted the U.S. Military's alleged commission of War Crimes during the Vietnam War. While it is true that one of petitioner's claims is that the respondents' aided and abetted the violations of the laws of war, which under the Nuremberg Principles [1]are war crimes, petitioners also claim that respondents directly violated the laws of war by providing to the government products they knew contained a very toxic poison, dioxin as they knew it would be used as a poison or poisoned weapon in war..[2] While Petitioners believe aiding and abetting liability is available under Alien Tort Statute, this Court should understand the complaint in this case raises both direct and aiding and abetting liability.

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[1]Principle VI of the Nuremberg Charter defines as War crimes all violations of the laws or customs of war, which the Hague regulations are.

[2]The Nuremburg principles specifically apply to all persons.

II. Respondents Fail to Mention that the "Rusk Memo" Includes Statements that the Defoliants would Not be Harmful to Humans Animals or Soil and Approval Was Based On Those Statements

On page 2, Respondents repeat the now thoroughly discredited factual assertion that in addition to the Department of Defense recommending use of defoliants, Secretary of State Dean Rusk advised President Kennedy that "successful plant killing ops... can be of substantial assistance in control and defeat of the [Vietcong]." While Rusk claims the advice he received was that the use of defoliants did not violate any rule of international law concerning chemical warfare, it is evident from the full memo and supporting documents, that Rusk as well as others who suggested the use of these defoliants did so only because of their belief that the defoliants were not harmful to humans animals or soil, and that only under those circumstances would the use of such defoliants not violate then accepted customary international law. (See C.A. App 1334-1339[3]). Thus, Rusk assumed, as Cramer had in 1945 that these defoliants were not poisonous to humans, animals or soil, and that only because of that fact they would pass muster under

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[3]For example, the Assistant Director for Far East, Neilson, suggested that for public relations purposes they should have tests on foliage in and around Saigon to demonstrate that the chemicals employed are not harmful to humans and animals. The Joint State-Defense message stated "As our people know from experience, these defoliants of the 2-4 D variety are not harmful to humans and animals. Later in that memo it is stated: "Since defoliant is harmless to personnel and animals, we intend to play it in a low key way..."

international law.

III. Respondents' Concession That the Toxic Effects of Dioxin Was Foreseeable Is Inconsistent With The Claim that The Poisoning by Dioxin Was Unintended.

Petitioners' have asked for review by this Court in part because the Court of Appeals, while acknowledging that Petitioners have properly alleged a customary international norm prohibiting the purposeful use of poison as a weapon against human beings, (32a), failed to find this norm applicable to the case because it recast the claim into one regarding the mere use of herbicides, not poison, and found that there was no intent to spray poison on human beings. The Court of Appeals never addressed Petitioners' claims that the knowledge of the poison in the herbicide was evidence of intent to poison.

In the Opposition Brief, Respondents have now made a startling admission. Respondents now repeatedly characterize their conduct as one involving the use of a product "to kill vegetation, which use allegedly had **unintended but forseeable toxic** effects on humans."[4] The use of this phrase

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[4]On page 12, Respondents say: " Petitioners have failed to show that there has ever been an international consensus that the 1907 Hague Regulations' proscription on "employ[ing] poison or poisoned weapons" extended so broadly as to prohibit the use of an herbicide to kill vegetation, which use allegedly had **unintended but foreseeable toxic effects on humans**."

"**unintended but forseeable**" is new. Neither the Respondents or the Court ever qualified the term "unintended" with the term "foreseeable". To the extent Respondents acknowledge that the direct toxic

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On page 16 Respondents' say: " Petitioners' central claim is that respondents' provision of Agent Orange to the U.S. military—while allegedly knowing that it contained "unnecessary and excessively high levels of dioxin"—aided and abetted the military's violation of the Hague Regulations' proscription on "poison or poisoned weapons."15 Pet. 2, 9. But a century of state practice refutes petitioners' novel assertion that the poison proscription extends so far as to prohibit the use of an herbicide to kill vegetation, **even if that use has unintended but allegedly foreseeable** toxic effects on humans. And petitioners certainly have not shown that this was the understanding of the poison proscription at the time of the Vietnam conflict.16Like the plaintiff in *Sosa*, petitioners "cite[] little authority that a rule so broad ha[d] the status of a binding ... norm." 542 U.S. at 736."

On page 22, Respondent's say: "Petitioners do not allege that respondents (or the U.S. military) purposefully used Agent Orange to poison human beings. Rather, they allege only that respondents knew that dioxin was toxic to humans and that "precautions in the manufacturing process ... could sharply limit the risk of contamination." C.A. App. 55, 60.22 But as demonstrated by the ICJ's *Nuclear Weapons* opinion, knowledge of poisonous effects is insufficient to violate the poison proscription. Recognizing petitioners' claim of **unintended but foreseeable poisoning** would contravene *Sosa*'s admonition that courts do not have a "mandate to seek out and define new and debatable violations of the law of nations." 542 U.S. at 728."

On page 24 Respondents say: "As the United States explained in its Second Circuit amicus brief ("U.S. Br."), the Cramer and Buzhardt opinions are fully consistent with the government's understanding that the Hague Regulations' poison proscription does not apply to the use of herbicides to destroy foliage and enemy crops, even if such use had **unintended but foreseeable toxic effects** on humans."

effects of the dioxin in herbicides was foreseeable, the Respondents are hard pressed to claim they did not intend the harm. That is, if one knows a harm is foreseeable, but does nothing to prevent it, the harm must have been intended. Given the current concession by Respondents that the harm was foreseeable, it is inconsistent to claim the harm was unintended. The fact that Respondents are conceding the issue of foreseeability is therefore important because it is strong evidence of intentionality.[5]

Moreover, that the toxic effects on humans from the use of their products was forseeable underscores the inappropriateness of dismissal of this case on a motion to dismiss. Petitioners have never been afforded the opportunity to examine defendants on what they knew in terms of foreseeability, when they knew it, and why, in the face of such knowledge, they continued to manufacture and sell to the U.S. military such a toxic substance.

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[5]Respondents quote its expert Reisman who quoted Oeter that the harmful consequences to humans would not render these dioxin laced herbicides illegal as long the intentional design of the material was not to inflict poisoning as a means of combat. The reference to Oeter is a reference to his claims, prior to the ICJ Advisory Opinion on Nuclear Weapons in which he posited that the court should find these weapons banned for reasons contained in International Humanitarian Law regarding inability to distinguish between military targets and civilian targets, based on proportionality, not on whether they were implicitly banned under the poison prescription. He posited the "intentional design" theory. The ICJ did not accept his views and went with a different standard.

IV. This Court Must Make the "Negative" Inference From the Cramer Opinion.

On pages 24 and 25 Respondents claim there can be no negative inference from the Cramer opinion. That is, Respondents admit that Cramer based his opinion that the use of herbicides in war did not violate international law on the information that the chemicals did not produce poisonous effects upon enemy personnel either from direct contact or indirectly through ingesting plants and vegetables..., Respondents claim the Court cannot infer the negative inference as to what Cramer would have opined if he had been presented with evidence that the herbicides contained a highly toxic substance. This makes no sense. Why would Cramer even mention that he is basing his opinion on facts given to him that the agents were not toxic if that were not an important point? There is no way to read the Cramer opinion other than to find that if he had been told that government intended to use herbicides which contained the highly toxic substance dioxin that he would have opined that they were illegal as they would have been.

V. The Vietnamese Claims Against These Respondents Are Not Preempted

On page 34 of its brief, Respondents claim that if this court grants the petition of the United States Veterans on the issue of the government contractor defense and rules in their favor, the Vietnamese claims would be preempted in any event.[6] The cases cited for

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[6]Petitioners assume that the Court of Appeals would have agreed with Judge Weinstein that assuming the illegality of the use of

this proposition do not so hold.[7] While it may be true that under certain circumstances, i.e. where the federal government may preempt the field, state actions which interfere may be preempted, the Respondents, argument here is essentially that allowing a state products liability claim by the Vietnamese nationals, when no other foreign national who brought a proper products liability claim would be barred, is based on an allegation that if the US wanted to negotiate with the Vietnamese on this issue, they would have less leverage if the case was going forward. The citation to *Garamendi, supra* for this proposition is not on point.[8]

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these herbicides the government contractor defense would not be available to Respondents. Petitioners also contend that if this Court grants the petitions of the US veterans on this issue, the ruling would apply to the Vietnamese. It is evident from the record below that the District Court and the Court of Appeals assumed that if the US veterans succeeded on the government contractor issue, the Vietnamese Petitioners would as well. In the lower courts the US veterans carried the laboring oar on this issue and the Vietnamese adopted their arguments.

[7]For example, *American Insurance Ass'n v Garamendi*, 539 U.S. 396 (2003) and *Kwan v United States*, 272 F.3d 1360, (Fed Cir 2001) address claims in areas where there are express treaties on the issue which preempted the field.

[8] *Garamendi* involved claims by holocaust survivors who claimed not to have received proceeds of insurance on their relatives do to Nazi confiscation of the proceeds. This issue had been negotiated by the US and Germany after the war and a fund set up as to claims in West Germany. After the reunification of Germany further negotiations resulted in a pool of money being set aside for victims. Persons who claimed not to have been covered by either settlement prevailed upon the California legislature to pass a statute requiring insurance companies doing business in the state to disclose information they had on non paid insurance policies. The insurance companies sued. Based on the facts of the case the

Indeed, this Government and these Respondents from the outset have resisted any claim of responsibility for the use of these herbicides. There is no comprehensive system of compensation which was agreed to which these Petitioners seek to circumvent in this law suit. This case is against chemical companies which introduced into Vietnam herbicides whose content they controlled. The fact that they knew these agents contained, and therefore intended they contained, high levels of the poison dioxin is a products liability issue, which assuming no government contractor defense, petitioners have a right to bring.

CONCLUSION

This case presents an opportunity for this court to address a very disturbing wrong to Vietnamese citizens who were exposed to dioxin during the war, and their offspring continue to suffer effects. It is often stated that international law is law that protects the weak, and that superpowers are somehow exempt.

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court found a sufficiently clear conflict between HVIRA and the President's foreign policy, as expressed both in the executive agreements with Germany, Austria, and France, and in statements by high-level Executive Branch officials, to require preemption here even without any consideration of the State's interest. The account of negotiations toward those agreements shows that the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds and disclosure of policy information, in preference to litigation or coercive sanctions. California has taken a different tack: HVIRA's economic compulsion to make public disclosure, of far more information about far more policies than ICHEIC rules require employs "a different, state system of economic pressure," and in doing so undercuts the President's diplomatic discretion and the choice he has made exercising it.

The Cramer opinion instructed the military and diplomatic leaders to come back to his office for another legal opinion if there was a question about whether proposed defoliants had poisonous effects. These Respondents had a financial interest in not disclosing what they knew and what they learned about the toxicity of dioxin. It was not until 1971 after millions of liters of chemicals had been sprayed and hundreds of pounds of dioxin had landed in Vietnam, and millions of people both in Vietnam and U.S. military had been exposed to this chemical, that Congress asked Defense Department General Counsel, Fred Buzhardt to give an opinion. His opinion mirrored Cramer's opinion and supports Petitioners' claims herein. Unfortunately, this Court cannot turn back the clock and order the government to have gotten a second opinion and demand transparency from these Respondents **before** it started using these defoliants in Vietnam. This Court cannot bring back to life those who have died prematurely nor undo the illnesses, disabilities and birth defects of so many who were exposed or whose parents and grandparents were exposed. The only thing this Court can do, and Petitioners argue must do, is to evaluate the legal claims made in this Petition. Petitioners assert the law they have cited is reason enough to grant the writ.

Respectfully submitted,

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